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IN THE

Supreme Court of the United States

No. 193. October Term, 1935.

ELINOR DORRANCE HILL,

Appellant,

v.

J. H. THAYER MARTIN, State Tax Commissioner of the State of New Jersey; WILLIAM D. KELLY, State Supervisor, Inheritance Tax Bureau, of the State of New Jersey; FRANK J. MURRAY, Comptroller of the State of New Jersey; WILLIAM H. ALBRIGHT, State Treasurer of the State of New Jersey; and DAVID T. WILENTZ, Attorney General of the State of New Jersey,

Appellees.

No. 194. October Term, 1935.

ETHEL M. DORRANCE, GEORGE MORRIS DORRANCE, M.D., ARTHUR C. DORRANCE and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of the Last Will and Testament of JOHN T. DORRANCE, Deceased,

Appellants,

v.

J. H. THAYER MARTIN, State Tax Commissioner of the State of New Jersey, et al.,

Appellees.

APPELLANTS' BRIEF.

Appeals From the District Court of the United States for the District of New Jersey.

WILLIAM A. SCHNADER,
JOHN MILTON,
Attorneys for Appellants.

International, 236 Chestnut St., Philadelphia

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IN THE

Supreme Court of the United States.

No. 193. October Term, 1935.

ELINOR DORRANCE HILL, *Appellant*,

v.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER OF THE STATE OF NEW JERSEY; WILLIAM D. KELLY, STATE SUPERVISOR, INHERITANCE TAX BUREAU, OF THE STATE OF NEW JERSEY; FRANK J. MURRAY, COMPTROLLER OF THE STATE OF NEW JERSEY; WILLIAM H. ALBRIGHT, STATE TREASURER OF THE STATE OF NEW JERSEY; AND DAVID T. WILENTZ, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, *Appellees*.

No. 194. October Term, 1935.

ETHEL M. DORRANCE, GEORGE MORRIS DORRANCE, M.D., ARTHUR C. DORRANCE AND CAMDEN SAFE DEPOSIT AND TRUST COMPANY, EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN T. DORRANCE, DECEASED, *Appellants*,

v.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER OF THE STATE OF NEW JERSEY, ET AL., *Appellees*.

APPELLANTS' BRIEF.

REFERENCE TO OFFICIAL REPORT OF OPINION OF COURT BELOW.

The opinion of the court below has not been reported.

STATEMENT AS TO JURISDICTION.

Appellants complied with paragraph 1, Rule 12, and respectfully refer to the statements as to jurisdiction filed in compliance therewith.

STATEMENT OF THE CASE.

This brief is in support of two appeals from the action of the District Court of the United States for the District of New Jersey, consisting of three judges (Circuit Court Judges Woolley and Davis and District Judge Avis), refusing an interlocutory injunction against the officers of the State of New Jersey charged by law with the duty of collecting transfer inheritance tax. The injunction was refused for want of jurisdiction to grant it.

In one case the plaintiffs were the executors of the will of Dr. John T. Dorrance, deceased. In the other case the plaintiff was a daughter of Dr. Dorrance, suing in her own behalf.

The purpose of the suits was to prevent the collection of transfer inheritance tax on the intangible personal property of the estate of Dr. Dorrance.

The theory of the cases is:

(a) That if the New Jersey officers,—the appellees here,—so construe the New Jersey Inheritance Tax Act of April 20, 1909, its amendments and supplements, as to authorize them to collect transfer inheritance tax upon the intangible personal property of the estate of Dr. Dorrance, it is unconstitutional,—the Act would authorize the collection of transfer inheritance tax on intangible personal property which does not have a situs in New Jersey because the decedent, prior to his death, had established his dwelling place and family home in another State without any present intention of not residing there indefinitely; and

(b) If the New Jersey Transfer Inheritance Tax cannot properly be so construed, the defendants below threaten to collect transfer inheritance tax on the intangible personal property of the Dorrance Estate without warrant of law.

The tax which appellees threaten to collect exceeds $12,000,000; and appellees claim interest on this amount at the rate of ten per centum per annum from September 21, 1931 (R. 11).

The estate of Dr. Dorrance, when these suits were filed, had already been compelled to pay to the Commonwealth of Pennsylvania transfer inheritance tax on the transfer of the same property, in the amount of $14,394,-698.88, with interest in the amount of $104,278.03, and to post a bond in the amount of $4,000,000 covering such further payment as may be due to Pennsylvania when the amount of the Federal estate tax has been finally determined (R. 10). (The amount of the Pennsylvania tax is eighty per centum of the amount of the Federal tax. The amount of the Federal Tax had not been finally determined. Subsequent to the filing of these suits the amount of the Federal estate tax was finally determined, and a further payment of tax was made by the estate to Pennsylvania.) See **Dorrance's Estate**, 309 Pa. 151 (1932), cert. denied 287 U. S. 660 (1932) and 288 U. S. 617 (1933).

The executors vigorously contested Pennsylvania's right to impose and collect the tax (R. 8-10); and the New Jersey tax assessment was suspended pending the final outcome of the Pennsylvania litigation (R. 10).

After the Supreme Court of Pennsylvania held that Dr. Dorrance was domiciled in Pennsylvania at the time of

his death, the New Jersey State Tax Commissioner again assessed an inheritance tax upon the transfer of the intangible personal property of his estate (R. 10), and thereupon the executors of Dr. Dorrance's will proceeded to contest the New Jersey assessment (R. 11-13).

They took the following steps:

(1) They appealed to the Ordinary, from the assessment made by the State Tax Commissioner (R. 11). The Ordinary is the judge of the Prerogative Court. This appeal is permitted by Section 18 of the Transfer Inheritance Tax Act. Heretofore the New Jersey authorities have regarded such an appeal as a part of the administrative procedure; and the New Jersey courts have described the Ordinary as a "legislative agent" for reviewing tax assessments.

(2) The Ordinary having sustained the assessment, the executors obtained from the Supreme Court of New Jersey, a writ of certiorari to review the Ordinary's decision (R. 11). We take the position that this review is also administrative in character, notwithstanding the fact that, like the preceding step, it must be taken in a court.

(3) After the Supreme Court sustained the assessment (R. 11), these actions were brought in the District Court of the United States for the District of New Jersey, before a three-judge court.

The executors have a right to appeal to the New Jersey Court of Errors and Appeals, from the decision of the Supreme Court (R. 11). They intend to exercise this right unless the present proceedings render such appeal unnecessary (R. 12).

Dr. John T. Dorrance died at Cinnaminson, New Jersey, on September 21, 1930, and was buried in West Laurel Hill Cemetery, in Philadelphia, Pennsylvania (R. 3). His will required his executors to probate it in New Jersey or forfeit their rights to serve as executors (R. 22, 128). They probated the will on October 2, 1930, in the office of the Surrogate of Burlington County, New Jersey (R. 4).

After the Supreme Court of Pennsylvania held that Dr. Dorrance was domiciled in Pennsylvania, the executors of his will on April 23, 1933, filed a petition with the Surrogate of Burlington County praying him to revoke the order of probate and the letters testamentary granted thereon. That petition is still pending (R. 4).

Shortly after that petition was filed,—on May 12, 1933,—the State Tax Commissioner of New Jersey,—one of the appellees,—filed in the Orphans' Court of Burlington County, New Jersey, a petition praying the removal of the executors and the substitution of the State Treasurer of New Jersey in their stead. That petition also, is still pending (R. 4).

It was because of the pendency of these petitions, that the appellant Elinor Dorrance Hill brought an independent suit in the court below (R. 5). Between her and the appellees there is diversity of citizenship (R. 3).

The three-judge court held that because of the proceedings in the New Jersey courts between the executors of the will of Dr. Dorrance and the State Tax Commissioner of New Jersey,—one of the appellees,—in which the executors challenged the assessment of the tax in question, Section 265 of the Judicial Code prevented the court from en-

joining the collection of the tax at the suit of the executors; and that the appellant Hill was in privity with the executors, and could not, for the same reason, have injunctive relief (R. 221-230).

Thereupon these appeals were taken. Pending their determination, the three-judge court granted a temporary injunction (R. 2).

In order to sustain their position, we conceive it to be necessary for appellants:

(1) To make it clear that the injunctions they seek are not forbidden by Section 265 of the Judicial Code;

(2) To show that their pleadings and injunction affidavits present a prima facie case; and

(3) As the appellees, in the court below, pleaded res judicata, to show that that plea is not sustainable.

To do this, many facts set forth in the pleadings and injunction affidavits, must be presented to the Court. We shall state, as briefly as we can, the facts (1) as to Dr. Dorrance's domicile, and (2) as to the New Jersey proceedings.

In their bills of complaint, the plaintiffs,—appellants here,—also rely upon the full faith and credit clause of the Constitution of the United States.

The entire record of the Pennsylvania proceedings, including the judgment of the Supreme Court of Pennsylvania in favor of the Commonwealth and against the executors of Dr. Dorrance's will, was offered in evidence before the State Tax Commissioner without objection by any of the appellees (R. 10, 44).

The details of the Pennsylvania proceedings appear at R. 8, 10, 22, 23, 497 and 499.

Facts As to Domicile of Dr. Dorrance.

According to the averments of the bills of complaint (R. 2, 493), plaintiffs' injunction affidavits (R. 17, 32), and plaintiffs' reply affidavits (R. 157-221):

John T. Dorrance was born at Bristol, Pennsylvania, on November 11, 1873 (R. 5).

Until he was twenty-three years of age, he lived in Pennsylvania except when in attendance at college and university. At age twenty-three he entered the employ of Joseph Campbell Preserve Company of Camden, New Jersey, and resided in Camden (R. 5).

He was married on August 18, 1906. Until the latter part of 1907 he and his wife lived in Camden, New Jersey. They then moved to Philadelphia, Pennsylvania, where they resided until 1911 when they established their home at Cinnaminson, New Jersey, in a property owned by and leased from Campbell Soup Company and known as "Pomona Farms" (R. 5).

In 1911 Dr. Dorrance was an officer of Campbell Soup Company of Camden, New Jersey, and in 1915 he became its president. At the date of his death he owned all of the shares of capital stock of that company (R. 5).

In April, 1925, Dr. Dorrance purchased a residential property known as "Woodcrest", at Radnor, Delaware County, Pennsylvania. He took title in the name of himself and his wife as tenants by the entireties. The property

consisted of 119 acres and the purchase price was $350,000. It was located in the finest residential section of suburban Philadelphia. To prepare the property for occupancy Dr. Dorrance expended more than the purchase price of the land (R. 5).

At this time Dr. Dorrance's family consisted of his wife and five children who had been born respectively in 1907, 1909, 1911, 1915, and 1919 (R. 5).

On November 14, 1925, Dr. Dorrance removed his wearing apparel, his personal effects, his library, and the wearing apparel and other personal effects of his wife and children from Cinnaminson, New Jersey, to "Woodcrest", Radnor, Pennsylvania, and there established his dwelling place and family home without any present intention of changing it to any other place (R. 5, 18, 215, 218).

During the rest of his life Dr. Dorrance spent substantially all of his time at the Radnor homestead except when he was at business during the day and when he was in New England on summer vacations or in Europe. He lived there continuously with his family (R. 6, 18, 218, 219).

Notwithstanding the removal of his family to "Woodcrest" Dr. Dorrance retained the place at Cinnaminson (R. 6).

He was unwilling to pay the Pennsylvania four-mill tax on intangible property and for that reason wished to retain his "legal residence" in New Jersey (R. 6, 21, 215).

But between November 14, 1925, and February 12, 1926, Dr. Dorrance did not spend a night at Cinnaminson. During the entire year 1926 he spent only eleven nights there. In the summer of 1926, while his family was in New Eng-

land, he lived at "Woodcrest", not at Cinnaminson; and he did likewise in the summer of 1927 (R. 6).

Prior to January 1, 1926, Dr. Dorrance instructed his secretary, Miss Gertrude Britton, to begin on that date to keep a diary showing where he spent each night (R. 158). She did so, and in her reply affidavit (R. 157) sets forth the daily entries in the diary from January 1, 1926 to the date of Dr. Dorrance's death (R. 159-213).

Rather than relate in detail the contents of these diaries, we have summarized in the following tables, the record of the nights spent by Dr. Dorrance at various places:

THE YEAR 1926

	January	February	March	April	May	June	July	August	September	October	November	December	TOTAL
Radnor, Pa.	28	26	28	27	10	12	16	21	29	29	20	28	274
Europe					14	11							25
Cinnaminson, N. J.	1	1	1			1	*6		1	1			12
At Sea					6	6							12
Trains & Boats							3	4					7
Jamestown, R. I.							3	6					9
Philadelphia, Pa.	2			2								3	7
Havre de Grace, Md.										1	8		9
New York		1	1		1		1				1		5
Washington, D. C.				1									1
Camden, N. J.			1										1
No Record							2				1		3
TOTAL	31	28	31	30	31	30	31	31	30	31	30	31	365

*"Woodcrest" servants on vacation for 10 days. See Mrs. Dorrance's affidavit (R. 216).

THE YEAR 1927

	January	February	March	April	May	June	July	August	September	October	November	December	TOTAL
Radnor, Pa.	30	25	29	25		10	20	13	30	25	27	28	262
Europe					26			3					29
Cinnaminson, N. J.	1	1											2
At Sea				5	5	2		13					25
Boats & Trains							1	1		3			5
Canada						18	3						21
Jamestown, R. I.							7	1					
Philadelphia, Pa.			1									1	2
Havre de Grace, Md.											3		
New York		1								2			3
No Record		1	1							1		2	5
TOTAL	31	28	31	30	31	30	31	31	30	31	30	31	365

THE YEAR 1928

	January	February	March	April	May	June	July	August	September	October	November	December	TOTAL
Radnor, Pa.	14	8	30	27	11				11	30	29	29	189
Europe					11	29							40
Bar Harbor, Me.							14	21	4				39
Cinnaminson, N. J.							*9	*8	*14		1		32
At Sea					6		6						13
Boats & Trains	7	3	1	2	2		1	2	1				19
Florida	10	18											28
New York				1						1			2
Chicago, Ill.					1								1
No Record							1					2	3
TOTAL	31	29	31	30	31	30	31	31	30	31	30	31	366

*"Woodcrest" servants at Bar Harbor with family, or on vacation. See R. 216.

THE YEAR 1929

	January	February	March	April	May	June	July	August	September	October	November	December	TOTAL
Radnor, Pa.	31	28	27		1	22				7	28	28	172
Europe				27	24				14	18			83
Bar Harbor, Me.						2	26	13	3				44
Cinnaminson, N. J.			1			*5	*4	*16	*6		2		34
At Sea			3	3	6				5	6			23
Trains						1	1	2	2				6
Philadelphia, Pa.												3	3
TOTAL	31	28	31	30	31	30	31	31	30	31	30	31	365

*"Woodcrest" servants on way to Bar Harbor or at Bar Harbor with family. See R. 216.

THE YEAR 1930

	January	February	March	April	May	June	July	August	September	October	November	December	TOTAL
Radnor, Pa.	29	19	22	11		8							89
Europe				15	31	13							59
Bar Harbor, Me.							26	27	11				64
Cinnaminson, N. J.	1	1	1			2	*3	*3	†6				17
At Sea				4		7							11
Trains & Boats		3	2				2	1	1				9
Florida		4	6										10
Philadelphia, Pa.	1												1
Chicago, Ill.		1											1
Newport, R. I.									2				2
TOTAL	31	28	31	30	31	30	31	31	20				263

*"Woodcrest" servants at Bar Harbor with family. See R. 216.

†"Woodcrest" not ready for occupancy when Dr. Dorrance fatally stricken.

The following table summarizes the diary record for the entire period:

SUMMARY, 1926-1930

	1926	1927	1928	1929	1930	TOTAL
Radnor, Pa.	274	262	189	172	89	986
Europe	25	29	40	83	59	236
Bar Harbor, Me.	0	0	39	44	64	147
Cinnaminson, N. J.	12	2	32	34	17	*97
At Sea	12	25	13	23	11	84
Trains & Boats	7	5	19	6	9	46
Florida	0	0	28	0	10	38
Canada	0	21	0	0	0	21
Jamestown, R. I.	9	8	0	0	0	17
Philadelphia, Pa.	7	2	0	3	1	13
Havre de Grace, Md.	9	3	0	0	0	12
New York	5	3	2	0	0	10
Chicago, Ill.	0	0	1	0	1	2
Newport, R. I.	0	0	0	0	2	2
Washington, D. C.	1	0	0	0	0	1
Camden, N. J.	1	0	0	0	0	1
No Record	3	5	3	0	0	11
TOTAL	365	365	366	365	263	1724

*Of the 97 nights which Dr. Dorrance spent at Cinnaminson after November 14, 1925, less than 24 were spent there when it would have been possible for him to live at "Woodcrest", Radnor.

At no time between November 14, 1925, and the date of his fatal illness in September, 1930, did Dr. Dorrance and his family ever assemble at Cinnaminson, New Jersey, for any purpose nor did Dr. Dorrance at any time during that period reside with his family at Cinnaminson or any

other place in New Jersey or otherwise treat the Cinnaminson residence as his home and the home of his family (R. 7, 18, 214, 218).

During this period Dr. Dorrance's wife and children attended church at Radnor, his children attended school in Pennsylvania, his oldest daughter was married at Radnor, and all social functions given by any member of the Dorrance family were at "Woodcrest".

Dr. Dorrance customarily spent his week-ends at "Woodcrest" with his family. One of his greatest delights was to walk about the place and inspect the grounds. The family celebrated Thanksgiving Day, Christmas Day, and other holidays at "Woodcrest". Whenever Dr. Dorrance went to Europe he left from and returned to "Woodcrest", and when the family went to New England for vacation its luggage was shipped from and returned to "Woodcrest" (R. 7, 19, 219).

Mrs. Hill,—Dr. Dorrance's oldest daughter,—was married on October 1, 1927. Her husband never saw Cinnaminson, N. J., until the time of Dr. Dorrance's last illness in September 1930; but Mr. and Mrs. Hill visited her family at Radnor at least two week-ends per month throughout that period (R. 219).

In August, 1926, Dr. Dorrance's mother and sister, both of whom were ill, moved into the place at Cinnaminson and lived there until they died,—his sister in the summer of 1928, and his mother early in 1929 (R. 7).

On June 30, 1928, Dr. Dorrance purchased additional ground adjoining "Woodcrest" consisting of more than eight acres at a cost of $52,500, and on July 26, 1929, ten additional acres at a cost of $60,000 (R. 7).

Prior to 1925, the annual cost of operating "Pomona Farms" as the Dorrance home was between $20,000 and $30,000. After the family moved to "Woodcrest" the cost of maintaining "Pomona Farms" became less each year. Respectively, the expenditures for that purpose for 1927 were $10,344.29; for 1928, $8,373.89; for 1929, $6,459.90; and for the first nine months of 1930, $4,200.17 (R. 8, 158).

On the other hand, the cost of operating "Woodcrest" was more than $90,000 per annum for 1926 and 1927, and at the same rate thereafter except in the summer when the household servants were taken to Maine (R. 8, 158).

Before "Woodcrest' was acquired, there were 10 servants at "Pomona Farms", but after that never more than 4. At "Woodcrest" the number of house servants was from 13 to 16, plus outside employees numbering 10 to 12 (R. 8, 19).

In his effort to maintain a "legal residence" in New Jersey, Dr. Dorrance continued to vote in New Jersey, paid a small personal property tax at Cinnaminson, retained his membership in the vestry of a church in Riverton, New Jersey, and made many declarations including a statement in his will that he was a resident of New Jersey (R. 6).

Dr. Dorrance desired his children to go to Cinnaminson periodically and spend a night there, and Mrs. Dorrance explained to them that it was necessary for the children to do that because their father wished to retain his "legal residence" in New Jersey and would become involved in a serious tax question under the laws of Pennsylvania unless he did so. But when the children went to Cinnaminson, it was necessary for them to take their cloth-

ing and other effects in a bag because they had no wearing apparel there (R. 20).

The entire Dorrance family customarily referred to "Woodcrest" as "home". They spoke of the place at Cinnaminson as "the farm". (R. 20).

The family chauffeur was moved, with his family, from Cinnaminson, N. J., to Radnor, Pa., on November 14, 1925. He lived there continuously thereafter. When Dr. Dorrance wished to be driven to Radnor, he said "Home". Whenever he wished to be driven to Cinnaminson, he said "Farm". (R. 220).

Dr. Dorrance was at Cinnaminson at the time of his death because the family had been at Bar Harbor, Maine, for the summer, the servants had been with them, and "Woodcrest" had not been occupied for the summer. For that reason, Dr. Dorrance went to Cinnaminson when he left Bar Harbor, intending to stay there until the servants had arrived at "Woodcrest" and prepared it for occupancy. He suffered a stroke and died within five days (R. 8).

As already stated, Dr. Dorrance's final resting place is in West Laurel Hill Cemetery, in Philadelphia, Pennsylvania (R. 3).

In their answer, appellees do not state any countervailing facts. They make numerous categorical denials and content themselves with an effort to incorporate by reference in an "Answering Affidavit", as a rebutting document, the entire transcript of testimony in the Pennsylvania litigation (R. 111). In this effort, the affiant did not swear to the truthfulness of any fact contained in the

Pennsylvania record. We objected to the inclusion of this material in this record (R. 235) and did not order any part of it printed (R. 541); but counsel for the appellees insisted that a part of it be printed (R. 543). Believing that this Court will not on these appeals, decide the controveries on the merits, we shall not summarize or analyze the Pennsylvania testimony of certain of the executors, printed at R. 237-454.

The New Jersey Proceedings.

On October 17, 1931, the State Tax Commissioner of New Jersey made an assessment of transfer inheritance tax against Dr. Dorrance's estate in the sum of $12,247,333.52, with an additional assessment in the sum of $4,521,143.90 on account of certain contingent remainders. The assessment was made under the supposed authority of the New Jersey Transfer Inheritance Tax Act of April 20, 1909, ch. 228 (R. 10).

On December 12, 1931, the State Tax Commissioner opened the assessments he had made, pending the decision of the Pennsylvania courts on Pennsylvania's claim for inheritance tax. The purpose of opening the assessments was to permit additional information to be submitted regarding Dr. Dorrance's domicile (R. 10).

On October 10, 1932, the State Tax Commissioner again made an assessment of transfer inheritance tax against the estate in the amount of $12,247,333.52, with interest at the rate of 10 per cent. per annum from September 21, 1931 (R. 10).

The assessment included tax on certain tangible personal property of Dr. Dorrance and upon all of his intangi-

ble personal property. It included a specific assessment against appellant Hill's life interest in Dr. Dorrance's estate, in the sum of $1,566,925.01 (R. 11).

On December 9, 1932, Dr. Dorrance's executors challenged the assessment by appeal to the Ordinary of the State of New Jersey (R. 11).

On May 11, 1934, the Ordinary entered a decree in the Prerogative Court, ordering the State Tax Commissioner to modify the assessment, but sustaining it insofar as it included tax on decedent's intangible personal property (R. 98).

Thereupon the executors obtained a writ of certiorari from the Supreme Court of New Jersey. That court on February 11, 1935, sustained the decree of the Prerogative Court (R. 11).

The appellants take the position that both the proceedings before the Ordinary and the review by the Supreme Court of New Jersey, were administrative in character, and not judicial.

On February 15, 1935, the State Tax Commissioner addressed a letter to the executors through their counsel threatening that if any further litigation was pursued in the courts of New Jersey, he would decline to give to the estate the benefit of the New Jersey Act of July 11, 1934, ch. 249, which authorized him to accept the principal amount of the tax without interest (R. 25).

Dr. Dorrance's executors have placed in escrow personal property of the estate appraised at more than $12,000,000, as security for the payment of the tax which defendants threaten to collect, if the executors shall finally

be held liable to pay it. Additional personal property appraised at more than $67,000,000 was also tied up because the State Tax Commissioner and the State Supervisor of the Inheritance Tax Bureau refused to issue waivers permitting the property to be transferred (R. 12-13).

The bills of complaint aver that the tax demanded by appellees "cannot be collected until after the institution of an action of debt in the name of the State of New Jersey, or a statutory proceeding in the Prerogative Court of New Jersey." (Paragraph 43, R. 11.) This averment is expressly admitted in the Amendment to Answer (R. 107).

The Basis for Injunctive Relief.

The bills of complaint set forth the following facts to establish the inadequacy of any remedy at law, and to support the averment that appellants will sustain irreparable injury unless injunctive relief is granted:

1. Were the executors to pay the tax claimed by the appellees, it would be the State Tax Commissioner's duty immediately to pay the money into the State Treasury (R. 14).

2. Immediately upon receiving the tax it would be the duty of the State Treasurer under the New Jersey Act of September 19, 1934, ch. 255, to apply $10,000,000 of the tax to the redemption of New Jersey State Bonds issued under that Act after a vote of the people (R. 14).

3. New Jersey has not consented to be sued in the United States courts for the recovery of inheritance tax erroneously paid or unlawfully collected (R. 14).

4. If the executors were to pay the tax which the appellees demand, even if the executors could thereafter

obtain a judgment against the appellees individually for collecting and receiving the tax illegally, the appellees would be financially unable to respond to such judgment and their official bonds would not be available to the executors as a source of recovery (R. 14).

5. Were the executors to pay under protest the tax claimed by the appellees, their only recourse thereafter would be an application for a refund under Section 15 of the New Jersey Inheritance Tax Act which permits but does not require the Comptroller to draw his warrant on the State Treasury in favor of persons who have "erroneously" paid inheritance tax to the State Tax Commissioner. But under this Act there is no appeal from the refusal of the Comptroller to grant a refund and a warrant would not result in the immediate payment of the refund for the reason that the available balances in the State Treasury would not enable so large a refund to be made until after the lapse of a substantial period of time, if at all (R. 15, 217).

6. Proper administration and distribution of the decedent's estate is impossible because of the pendency of this tax claim (R. 13).

7. The executors are compelled to maintain large cash reserves at a low rate of interest because of the threatened tax collection by the appellees (R. 12).

8. Further litigation in New Jersey will involve payment of expenses which cannot be recovered either from the appellees or from the State of New Jersey (R. 14).

9. The appellees' claim is alleged to constitute a lien on all of the property of decedent's estate, and constitutes a cloud upon the title thereto (R. 14).

10. Although the executors of the decedent's estate have placed in escrow property valued at more than $12,000,000, as security for the payment of the claimed tax, the appellees have a technical right to insist upon the filing of a bond in an amount exceeding $24,000,000. The premium on such a bond would be substantial and would be a non-recoverable item of expense (R. 13).

In support of our contention that these averments amply warrant equitable relief we cited to the court below **Fox v. Standard Oil Co.**, 294 U. S. 87 (1935); **City Bank Farmers Trust Co. v. Schnader**, 291 U. S. 24 (1934); **Stewart Dry Goods Co. v. Lewis**, 287 U. S. 9 (1932); **Atlantic Coast Line v. Daughton**, 262 U. S. 413 (1923).

SPECIFICATION OF ERRORS.

1. The United States District Court for the District of New Jersey erred in denying the interlocutory injunctions prayed for by the plaintiffs.

2. The United States District Court for the District of New Jersey erred in holding that it was without jurisdiction to grant the prayers of the Bills of Complaint for interlocutory injunctions.

3. The United States District Court for the District of New Jersey erred in entering, in each case, the following decree:

> "And now, to wit, June 4, 1935, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:
>
> "I. The prayer of the Bill of Complaint for interlocutory injunction be, and is hereby denied for want of jurisdiction, to grant such interlocutory injunction."

ARGUMENT.

SUMMARY.

The bills of complaint present a Federal question of great importance. It is, in effect:

May the Federal courts restrain State officers from collecting inheritance taxes on the intangible personal property of a person who at the time of his death was domiciled in another State?

We submit that they may grant an injunction in such case: If the State officers are properly construing their inheritance tax statute, it is unconstitutional under the Fourteenth Amendment. If they are not properly construing the statute, they are seeking to take property of the estate without warrant of law.

Between **City Bank Farmers Trust Company v. Schnader, et al.**, 291 U. S. 24 (1934), and the present cases there is but one important difference:

That case involved the interpretation by State taxing officers of an inheritance tax act in relation to the situs of **tangible** personal property.

These cases involve the interpretation by State taxing officers of an inheritance act in relation to the situs of **intangible** personal property.

These cases come within Section 266 of the Judicial Code because the appellants are seeking to prevent the enforcement of a State statute on the ground of its unconstitutionality under the Constitution of the United States.

The facts pleaded in the bills of complaint and contained in the injunction affidavits and the reply affidavits in the court below, clearly establish the fact that, prior to

his death, Dr. Dorrance had removed his family home to Pennsylvania without any present intention of not residing in that State indefinitely.

Under the law of domicile as established by this Court and as stated by the American Law Institute in its **Restatement of the Law of Conflict of Laws**, Dr. Dorrance was domiciled in Pennsylvania at the time of his death.

The technical objections advanced by appellees against appellants' right to relief, are without merit:

(a) An injunction may be granted without violating Section 265 of the Judicial Code:

No action is now pending in New Jersey which an injunction would stay.

No judgment for inheritance tax has been rendered.

The only action thus far has been an assessment, made by an administrative officer. Challenged on appeal by the executors, that assessment was modified by direction of a court, but otherwise affirmed. A second court has sustained the action of the first court.

To collect the tax, the appellees must institute a new and independent action. The action would be either an action of debt in the name of the State of New Jersey, or a statutory proceeding against the persons interested in the property of the estate.

To date, the New Jersey authorities have an assessment against the property of the Dorrance Estate, and nothing more.

And whether the action of the courts in passing upon the assessment was administrative or judicial, the assessment is merely an administrative act.

(b) As there has never been a judgment in a judicial proceeding in New Jersey, res judicata cannot be pleaded successfully:

The New Jersey court of last resort has held that in reviewing tax assessments, the Ordinary is merely a "legislative agent". Until now, the Attorney General of New Jersey has taken the position that the function of the Ordinary in these cases is "purely administrative".

The Supreme Court of New Jersey, on certiorari to the Ordinary, also makes an administrative review of the State Tax Commissioner's action. Upon no theory could the Court's action be regarded as an ordinary appeal.

The Court takes the record as made by the Tax Commissioner, may order additional evidence taken on deposition or otherwise, may permit the parties to take additional evidence, and upon consideration of the facts and the law, may affirm, set aside or modify the assessment.

This procedure parallels that which this Court considered in **Radio Commission v. General Electric Co.**, 281 U. S. 464 (1930).

(c) Even if the action of the Supreme Court of New Jersey was judicial, it is not res judicata in the Federal courts because it is not the judgment of a State court of last resort, and it has not been acquiesced in by the executors. They will take a further appeal unless these proceedings render it unnecessary.

(d) None of the appellants is estopped to take action against the appellees. Jurisdiction of New Jersey au-

thorities to collect the tax in question must arise by law; it cannot be acquired by consent or by conduct.

(e) There was no undue delay in instituting these proceedings. They were brought (as appellants conceive the law) almost immediately at the conclusion of the administrative procedure for the correction of the New Jersey tax assessment. In any event, the appellees have not been prejudiced if there was delay.

Appellant, Mrs. Hill, has a right to maintain an action in her own name.

The authority of the executors is under fire, both on their own petition for revocation of probate, and on the petition of the State Tax Commissioner for their removal and the substitution in their stead, of the New Jersey State Treasurer.

Both of these petitions have been pending for a long time. Should either of them be granted, Mrs. Hill's interests, as affected by the appellees' threat to collect inheritance tax, would be gravely prejudiced in the absence of independent proceedings in her own name.

The circumstances of these cases are such that the Federal courts should not be astute to find reasons for declining to take jurisdiction or grant relief.

Already the executors have been obliged to pay to the Commonwealth of Pennsylvania, transfer inheritance tax on the intangible personal property of this estate in the amount of more than $14,000,000. That payment was made only after a bitter contest which was carried to the highest court of the State. Two petitions for certiorari were denied by this Court. 287 U. S. 660 (1932); 288 U. S. 617 (1933).

The final Pennsylvania judgment was offered in evidence before the New Jersey State Tax Commissioner, without objection on the part of the New Jersey authorities.

But the courts of New Jersey (we contend, acting in an administrative rather than a judicial capacity), reviewing the action of the State Tax Commissioner in assessing the intangible personal property of the estate for taxation, held that, although the Pennsylvania action was *in rem*, they were not obliged to recognize the Pennsylvania judgment unless they found that Dr. Dorrance was domiciled in Pennsylvania at the time of his death, and that, therefore, the Pennsylvania courts had jurisdiction over the subject matter of the action. And they found to the contrary.

Nevertheless, in these actions, the Federal courts are asked by the New Jersey authorities to recognize as res judicata the judgment (if it is a judgment, which we deny), of an intermediate court of appeal, without any inquiry into the question whether decedent, at the date of his death was domiciled in New Jersey, and thus whether the New Jersey courts had jurisdiction over the subject matter of the action.

Neither comity nor public policy require the Federal courts to recognize the judgment of an inferior State court of one jurisdiction, and to refuse to recognize the judgment of the highest court of another State on the identical question, even though the parties to the litigation were not the same.

I.

SECTION 265 OF THE JUDICIAL CODE DOES NOT PROHIBIT THE GRANTING OF INJUNCTIONS IN THESE CASES.

The court below (R. 228) refused to grant the injunction sought by the appellants, because in its opinion, it was prevented from doing so by Section 265 of the Judicial Code (U. S. C. A. Section 379).

That section provides that:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Neither the State of New Jersey nor any officer of the State has ever instituted any action in any court to collect inheritance tax from the executors of the will of Dr. Dorrance or from any beneficiary under the will.

Neither the State nor any of its officers has ever been plaintiff in any action against the executors which resulted in a judgment against the executors.

At the present time, no litigation between the executors of the estate and any of the appellees is pending in the courts of New Jersey.

An assessment has been made by an executive officer, and on appeal by the executors it has been modified and otherwise affirmed by the Prerogative Court and by the Supreme Court of New Jersey.

The assessment has not changed in character or effect because it has been affirmed as corrected.

It is still an assessment and nothing more.

To collect inheritance tax by adverse proceedings two methods are available to the officers of the State of New Jersey, as follows:

1. If they desire to proceed against "administrators, executors, trustees, grantees, donees or vendees", they may bring an action of debt "in the name of the State of New Jersey." Transfer Inheritance Tax Act, Section 1, Appendix, p. 111.

2. If they desire to proceed against property they may cause the register of the Prerogative Court to issue a citation against "the persons or corporations interested in the property liable to said tax," as provided in Section 21 of the Transfer Inheritance Tax Act. Appendix, p. 124.

This procedure was undoubtedly intended to apply to the situation covered by Section 10 of the Transfer Inheritance Tax Act (Appendix, p. 117), namely, "Whenever any of the **real estate** of which any decedent may die seized shall pass to any body politic or corporate, or to any devisee or beneficiary . . ."

That one of these actions must be instituted to collect the tax, is admitted by the pleadings.

Paragraph 43 of the Bill of Complaint in the Hill Case (R. 11) and Paragraph 36 of the bill in the Executors' Case (R. 500), aver:

> "And the tax which defendants demand cannot be collected until after the institution of an action of debt in the name of the State of New Jersey, or a statutory proceeding in the Prerogative Court of New Jersey."

The answers to these averments appear at R. 107 and R. 538, as follows:

"They [defendants] admit that said tax cannot be collected until after the institution of an action of debt in the name of the State of New Jersey, or by a statutory proceeding in the Prerogative Court of New Jersey; . . ."

The statutory proceeding was described by the Attorney General in his brief in the court below (page 33) as follows:

"The quoted provision of the statute (sec. 21) authorizes the Tax Commissioner to report to the register of the Prerogative Court the facts as to unpaid taxes, and **after a hearing in that court**, the register, upon the making of a decree therein, is authorized to furnish copies of said decree to the Commissioner and the same are **then** docketed and filed by the Clerk of the Supreme Court or by the County Clerk of any county upon the request of the Tax Commissioner, 'and the same shall have the same effect as a lien by judgment, and execution shall issue thereon according to the rule and practice appertaining to other judgments docketed and filed with said respective clerks.'"

That there has been no judgment of a court in this case, to which either an action of debt or a proceeding under Section 21 of the Transfer Inheritance Tax Act, could be supplemental, appears from the decrees of the Prerogative Court and of the Supreme Court.

The Prerogative Court decreed (R. 100):

". . . that **respondent** [the State Tax Commissioner] **in determining the clear market value of the property of the estate of John T. Dorrance**, deceased, **allow further deductions** (including additional counsel fees and executors' commissions), **in the amount of $533,784.81**, as allowed by the Orphans' Court of Burlington County, New Jersey, and

"It is further Ordered, Adjudged and Decreed that **the assessment of transfer inheritance taxes as made by respondent** on October 10, 1932, amounting to $12,247,333.52 upon the transfer of the property of said John T. Dorrance, deceased, as that of a resident decedent, **subject to the above modifications,** be and the same in all other respects **is hereby affirmed.**"

Thus the assessment was ordered to be corrected by the State Tax Commissioner.

The Prerogative Court did not enter a judgment or decree against the executors. It merely affirmed, after future correction by the State Tax Commissioner, that officer's administrative act.

And the action of the Supreme Court of New Jersey (R. 157) was:

"It is . . . Ordered that the **assessment** of transfer inheritance taxes in the matter of the estate of John T. Dorrance, deceased, **as corrected** by the final decree of the Prerogative Court . . . be and the same **is hereby affirmed** and that the writ of certiorari allowed herein be dismissed, with costs."

After correcting the assessment, assuming no further appeal by the executors challenging the validity of the assessment, the State Tax Commissioner would be in a position to call upon the Attorney General to bring against the executors an action of debt in the name of the State of New Jersey, for the collection of the tax.

Appellees' effort, notwithstanding the admissions in the Answers, now to say that collection proceedings are supplementary to the proceedings heretofore had in the courts of New Jersey, becomes absurd, when the actual

decrees of those courts are examined. (See Appellees' Brief on the Question of Jurisdiction, p. 2.)

It is evident that any action to collect the tax is a new and independent action.

There is a well recognized distinction between assessment proceedings and collection proceedings. **Gully v. Interstate Natural Gas Co.**, 292 U. S. 16 (1934), 18; **Ex Parte Williams**, 277 U. S. 267 (1928), 271.

Exhaustive research has disclosed only one case in which a contention in any way resembling that now made by appellees, came before this Court.

In **Mississippi R. R. Com. v. Illinois Central R. R. Co.**, 203 U. S. 335 (1906) the railroad had obtained below an injunction against the Commission to restrain enforcement (by collection of a penalty in a state court) of an order of the Commission that the railroad stop certain trains at a certain town, on the ground that the order violated the commerce clause of the Federal Constitution. It was argued for the Commission that the injunction violated Section 265 of the Judicial Code. The Supreme Court flatly sustained the propriety of the injunction, saying, at page 341:

> "It is urged, however, that proceedings in a state court were commenced by the presentation of the petition of the citizens of Magnolia to the railroad commission, and because the commission having made an order to stop the trains, would have to resort to the proper state court to aid it in the enforcement of its order, therefore the whole proceeding must be regarded as in a state court from the commencement. Whatever may be the provision of the state statute in regard to the enforcement solely by the state court of the order

of the railroad commission, the proceeding while before the commission never thereby became a proceeding in a state court, and the jurisdiction of the Federal court to enjoin the commission from the enforcement of its order, because such order was a violation of the Federal Constitution, was not in the least affected."

The relief plaintiff seeks is exactly the same as the relief sought by the plaintiff in **City Bank Farmers Trust Company v. Schnader et al.**, 293 U. S. 112 (1934), except that the plaintiff here adds one item, namely, that the defendants be enjoined from refusing to release the securities of the Dorrance Estate now held in escrow.

Obviously, if relief had been granted after hearing on the merits in the **City Bank Farmers Trust Company Case** it would have been impossible for the defendants,—the Attorney General and the Secretary of Revenue of Pennsylvania,—to institute any action at law or in equity in the State courts, to collect the tax.

The court below apparently confused the provision of Section 265 of the Judicial Code, with the doctrine of election of remedies, as it sometimes applies as between courts of the same jurisdiction.

At R. 228, Judge Woolley said:

". . . But we are constrained to hold that, having passed by the ending of the administrative proceedings in respect to the tax and having thereafter entered a state judicial tribunal, the executors must abide the consequences, one of which is that proceedings in the state courts were not ended by the judgment of the Supreme Court . . . ."

It is well settled that the mere existence of pending litigation between the same parties in the State courts does

not defeat the jurisdiction of the Federal Courts: **Grubb v. Public Utilities Commission,** 281 U. S. 470 (1930) 476; **Hunt v. New York Cotton Exchange,** 205 U. S. 322 (1907), 339; **Stanton v. Embrey,** 93 U. S. 548 (1876), 554; **Central Iron & Coal Co. v. Massey,** 268 Fed. 300 (C. C. A. 5th, 1920); **Borden's Condensed Milk Co. v. Baker, et al.,** 177 Fed. 906 (C. C. A. 3d, 1910).

And this is equally true whether the proceeding in the Federal court is at law or in equity. **Insurance Company v. Brune's Assignee,** 96 U. S. 588 (1877); **Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc.,** 62 F. (2d) 1004 (C. C. A. 2d, 1933); **Borden's Condensed Milk Co. v. Baker et al.,** *supra;* **Bank of Kentucky v. Stone,** (Taft J.) 88 Fed. 383 (C. C. Ky., 1898).

In **Krauss Lumber Co. v. Bossert & Sons,** Judge Learned Hand said, at p. 1006:

> "Coming to the merits, the first question is whether the pendency of the action upon the contract in the State court was a bar. That action was at law, ignoring the arbitration clause; this suit is in equity upon that clause. The causes of action are no doubt the same; but it is well settled that the plea of lis alio pendens is bad when the other suit is in a State court. . . ."

Thus it is clear that Section 265 of the Judicial Code does not apply when the only reason for applying it would be that there has been in the State courts litigation between the same parties relating to the same subject-matter.

Necessarily it prevents a Federal injunction restraining a plaintiff in a State court from proceeding with his suit. **Monamotor Oil Co. v. Johnson,** 292 U. S. 86 (1934); **Dial v. Reynolds,** 96 U. S. 340 (1877).

And it is true that when a party has sued for and obtained a judgment in the State courts, the Federal courts cannot enjoin proceedings to enable the plaintiff to obtain satisfaction of his judgment, whether such proceedings be an ordinary execution: **Leathe v. Thomas**, 97 Fed. 136 (C. C. A. 7th, 1899), or receivership proceedings supplemental to judgment: **Mutual Reserve Fund Life Association v. Phelps**, 190 U. S. 147 (1903).

In the case last cited, Mr. Justice Brewer said, at page 159:

> "Again, the proceeding for the appointment of a receiver was not a new and independent suit . . ."

and he described the procedure as "a mere continuation of the action at law."

As we have shown, there were no proceedings pending in any court of New Jersey when the present bills were filed, no officer of New Jersey had ever brought suit in any court to collect the tax, and the only proceedings ever carried to a New Jersey court were the executors' attacks upon the administrative act of the State Tax Commissioner in making a tax assessment.

At the conclusion of the court proceedings, it was the duty of the administrative officer to revise his administrative act. That having been done, the court said in effect, the administrative act,—the assessment,—will be valid.

Assessment must always precede collection, just as a valid contract must always precede a suit for breach of contract.

Suppose the parties to a contract became involved in a dispute over its validity, and one of them sued for a declaratory judgment. Suppose that the court entered its judgment sustaining the contract as valid.

Would a suit subsequently brought by the respondent in the declaratory judgment proceedings, to recover money due under the contract, be a mere continuation of the declaratory judgment proceedings?

To ask the question is to answer it.

We respectfully submit that there is no foundation for the belief of the court below, that Section 265 of the Judicial Code applies to this case.

II.

THIS CASE COMES WITHIN SECTION 266 OF THE JUDICIAL CODE.

It has repeatedly been held that a substantial Federal question is involved when the plaintiff contends that the construction of a State statute by an administrative officer of the State violates the Constitution of the United States. **Sterling v. Constantin**, 287 U. S. 378 (1932). **Chicago, Rock Island, Pacific Railroad Company v. Kendall**, 266 U. S. 94 (1924), **Greene v. Louisville and Interurban Railroad Company**, 244 U. S. 499 (1917); **Home Tel. & Tel. Co. v. City of Los Angeles**, 227 U. S. 278 (1913).

It is immaterial that the statute as enacted is valid on its face, if the interpretation placed upon it by administrative officers would render it unconstitutional; and as Mr. Justice Brandeis said in **Nashville C. & St. L. Ry. v. Walters**, 294 U. S. 405 (1935), at p. 415:

> ". . . A statute valid as to one set of facts may be invalid as to another . . ."

We contend that in all material respects this case parallels **City Bank Farmers Trust Company v. Schnader, et al.**, 291 U. S. 24 (1934).

In that case the plaintiff brought a bill in equity to enjoin the Secretary of Revenue and the Attorney General of Pennsylvania from collecting a transfer inheritance tax on tangible personal property owned by a non-resident but located in Pennsylvania at the date of death.

The plaintiff contended that the property did not have a situs in Pennsylvania for tax purposes because it had been loaned for an uncertain period to an art museum, with the understanding that it should be returned to the owner at his request.

The Pennsylvania officers answered that the property had been located in Pennsylvania for such a length of time that it had acquired a situs for tax purposes to the exclusion of the former situs of the property.

A three-judge court dismissed the bill for want of jurisdiction.

This Court reversed the three-judge court, required it to take jurisdiction, and later decided on the merits that the property had a situs for tax purposes in Pennsylvania. **City Bank Farmers Trust Company v. Schnader, et al.**, 293 U. S. 112 (1934).

We respectfully invite a comparison between the bills of complaint in the **City Bank Farmers Trust Company Case** and in this case.

The jurisdictional averments are as follows:

City Bank Case.	This Case.
23. "The plaintiff is advised by its counsel, believes and therefore avers, that if the said section 1 of the Act of June 20, 1919, P. L. 521, as amended (paragraph 12,	58. "If the New Jersey Act of April 20, 1909, ch. 228, authorizes defendants to collect transfer inheritance tax upon the transfer of intangible personal property

supra) be construed to impose an inheritance tax upon the transfer by death of the non-resident owner thereof, of the said 79 paintings, merely because they were temporarily 'within this Commonwealth' at the time of decedent's death, it is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

of a decedent, who prior to his death had established his dwelling place and family home in another state, without any present intention of not residing there indefinitely, it is unconstitutional in that it deprives the plaintiff as a legatee under decedent's will of her property without due process of law and denies to her the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

59. "If said statute authorizes defendants to collect transfer inheritance tax upon the transfer of intangible personal property of the estate of John T. Dorrance, deceased, under the circumstances heretofore in this Bill of Complaint set forth, it is unconstitutional in that it deprives the plaintiff as a legatee under decedent's will of her property without due process of law, and denies to her the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

24. "The plaintiff is advised by its counsel, believes and therefore avers, that if said statute be construed as not applying to property temporarily within the Commonwealth at death, then the threatened appraisal, assessment and collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

60. "If said statute be construed as not applying to property of a decedent, who prior to his death had established his dwelling place and family home in another State, without any present intention of not residing there indefinitely, then the threatened collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff as a legatee under decedent's will, of her property without due process of law and denies to her the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

The only differences between the cases are as follows:

1. **City Bank Farmers Trust Company v. Schnader** involved the situs of tangible personal property as determined by the location thereof, for purposes of transfer inheritance tax; this case involves situs of intangible personal property as determined by the domicile of the owner thereof, for purposes of transfer inheritance tax;

2. In the former case, the federal litigation was instituted before the state administrative procedure had been completed; here the administrative procedure has been completed; and

3. In this case, there is, in addition to a constitutional question under the Fourteenth Amendment, a question under the "Full Faith and Credit Clause".

We shall deal separately with these differences.

Situs and Domicile.

In **City Bank Farmers Trust Company v. Schnader**, 291 U. S. 24 (1934), at page 27, Mr. Justice Roberts paraphrased the constitutional questions raised by the bill of complaint, as follows:

> ". . . The bill charges that if the statute be construed to impose an inheritance tax upon the paintings merely because they were temporarily within the Commonwealth at the time of the decedent's death, it is unconstitutional as depriving the appellant of property without due process and denying equal protection of the laws, in contravention of the Fourteenth Amendment; and if the statute be construed as not applying to the property, the threatened appraisal, assessment and collection by the defendants will unconstitutionally deprive the appellant of property without due process and deny it equal protection."

And when the case came before this Court on the merits, 293 U. S. 112 (1934), Mr. Justice Butler said, at page 116:

> "Appellant, maintaining that when the owner died the paintings had no actual situs within Pennsylvania because only temporarily there, brought this suit to enjoin enforcement on the ground that, if the statute be construed to tax the transfer by the death of the nonresident owner, it is repugnant to the due process clause of the Fourteenth Amendment. As the transfer cannot be subjected to taxes imposed by more than one

> State . . . appellant framed its complaint to call for a decision whether Pennsylvania or New York is entitled to the tax. . . ."

The Court then considered fully the facts of the case, which, as indicated in the last quotation, involved the situs for transfer inheritance tax, of tangible personal property.

Mr. Justice Butler, at the end of his opinion,—page 120,—said:

> ". . . By sending them [the paintings] into Pennsylvania and by his omission to have them returned to New York, and his lack of definite intention ever so to do, Clarke failed to maintain an actual situs in New York and created one for them in Pennsylvania. . . ."

Now, let us turn to the cases which deal with the imposition of transfer inheritance tax on intangible personal property.

In **Farmers Loan and Trust Company v. Minnesota,** 280 U. S. 204 (1930), Mr. Justice McReynolds delivered the majority opinion of the court. The case involved the question whether Minnesota could impose a transfer inheritance tax upon the transfer of state and municipal bonds issued respectively by Minnesota, and by certain cities of that state, and owned at the time of his death by a person domiciled in New York.

The Court held that Minnesota could not tax the bonds. At page 212, Mr. Justice McReynolds said:

> "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domi-

cile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

And in concluding his opinion he said:

"The bonds and certificates of the decedent **had acquired permanent situs** for taxation in New York; their testamentary transfer was properly taxable there but not in Minnesota."

In **Baldwin v. Missouri**, 281 U. S. 586 (1930), Missouri attempted to impose a transfer inheritance tax upon bank deposits within Missouri, United States bonds located within the State and promissory notes physically within the State which belonged at the time of her death to a person domiciled in Illinois.

Mr. Justice McReynolds again delivered the opinion of the Court. He said, at page 593:

"We find nothing to exempt the effort to tax the transfer of the deposits in Missouri banks from the principle applied in Farmers Loan & Trust Co. v. Minnesota, supra. So far as disclosed by the record, the **situs** of the credit was in Illinois, where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwhere.

"The bonds and notes, although physically within Missouri, under our former opinions were choses in action with **situs** at the domicile of the creditor. At that point they too passed from the dead to the living,

and there this transfer was actually taxed. As they were not within Missouri for taxation purposes the transfer was not subject to her power. Rhode Island Trust Co. v. Doughton, 270 U. S. 69."

In **Beidler v. South Carolina Tax Commission**, 281 U. S. 1 (1930), South Carolina imposed a transfer inheritance tax upon the stock of a South Carolina corporation owned at the time of his death by a person domiciled in Illinois, and also upon an indebtedness owing to the decedent by a corporation of South Carolina.

The decedent's executors did not challenge the imposition of tax on the stock of the corporation, but resisted the payment of the tax on the indebtedness.

In an opinion by Mr. Chief Justice Hughes, this Court held that the indebtedness could be taxed only by Illinois, —the state of the creditor's domicile.

And in **First National Bank of Boston v. Maine**, 284 U. S. 312 (1932), the question was presented whether Maine could impose a transfer inheritance tax upon stock of a Maine corporation owned at the time of his death by a person domiciled in Massachusetts. This Court held that Maine could not impose the tax. In delivering the opinion of the Court, Mr. Justice Sutherland said, at page 326:

". . . Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local **situs** of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local **situs** in another state for the purpose of transferring the same thing there . . ."

And at page 328:

"We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only."

It was held that only the state of domicile could impose the tax.

These cases make it clear that the question which arises when two states attempt to impose transfer inheritance taxes upon the same intangible property of a decedent is a question of **situs. Situs** for the purpose of taxation **depends upon the domicile of the owner** at the time of his death.

Thus the parallel between **City Bank Farmers Trust Co. v. Schnader,** and the present case is complete.

In both cases the question at issue is the **situs** of property for inheritance taxation. In the former case the question depended upon the location of tangible property as determined by the duration and circumstances of its physical presence; in the present case the question depends upon the location of intangible property as determined by the domicile of the owner at the time of his death.

In both cases, whether the act violates the due process clause of the Fourteenth Amendment depends upon the construction given to it by State administrative officers in applying the law to the facts.

The Constitutional Questions in This Case.

The appellants contend that the New Jersey assessment, as far as it includes transfer inheritance tax on Dr. Dorrance's intangible personal property, violates the Fourteenth Amendment of the Constitution of the United States.

If the New Jersey Inheritance Tax Act of April 20, 1909, ch. 228, its amendments and supplements, has been properly construed by the appellees (and by the other

administrative agencies of New Jersey), as applying to property the situs of which was outside of the State because the owner was not domiciled in New Jersey at the time of his death, it is unconstitutional under the Fourteenth Amendment.

If the Act has not been properly construed by the appellees, the assessment violates the due process and equal protection clauses of the Fourteenth Amendment.

And the refusal of the appellees to give full faith and credit to the judgment of the Supreme Court of Pennsylvania, received in evidence by the State Tax Commissioner without objection, is repugnant to Article IV, Section 1 of the Constitution of the United States.

The Time of Instituting Proceedings.

The basic rule which governs the time when proceedings may be brought in a Federal court to enjoin State officers from committing unconstitutional acts under State statutes, is:

Suit must not be brought until the legislative or administrative procedure of the State has been completed.

To this general rule exceptions have been made in only a very few cases, and only under unusual circumstances.

After the State proceedings have reached the judicial stage, suit may always be brought in the Federal court; and as we have shown (ante, p. 32) the pendency in the State courts of another suit between the same parties, involving the same subject matter, does not bar a suit in the Federal courts.

In **Prentis v. Atlantic Coast Line Company**, 211 U. S. 210 (1908), this Court held that the review by the Supreme Court of Virginia of the action of the State Corporation

Commission in a rate case was administrative; and that pending that review, a bill in equity filed in the United States District Court under Section 266 of the Judicial Code should be held in abeyance.

In sharp contrast, is the decision in **Bacon et al. v. Rutland R. R. Co.**, 232 U. S. 134 (1914). There the Vermont Public Service Commission had made an order requiring the plaintiff to build a certain passenger railway station.

Without appealing to the Supreme Court of the State, the railroad company applied to a three judge court for an injunction to stay enforcement of the Commission's order.

In an opinion by Mr. Justice Holmes, the Court affirmed the action of the District Court in granting an injunction.

The basis of the decision was that the review by the Supreme Court of the State was wholly judicial and that therefore the railroad company was free to assert its rights in the District Court without first taking an appeal to the Supreme Court of the State.

In **Pacific Telephone & Telegraph Company v. Kuykendall**, 265 U. S. 196 (1924) the Department of Public Works of the State of Washington refused to permit the telephone company to increase its rates. Without taking an appeal to the Superior Court of Washington the plaintiff applied to a three judge court for an injunction. The injunction was denied. Thereupon the company appealed to this Court but before that appeal was argued the District Judge heard the case on a motion to dismiss the bill and granted the motion. From this action a second appeal was taken.

Mr. Chief Justice Taft speaking for the Court, held that the review by the Superior Court of Washington was

a judicial review, and accordingly that the District Court had erred in refusing the injunction.

In **Oklahoma Natural Gas Company v. Russell et al.**, 261 U. S. 290 (1923) the gas company had applied to the Oklahoma Corporation Commission for higher rates which were denied. The Constitution of Oklahoma permitted an appeal to the Supreme Court of the State acting in a legislative capacity with power to substitute a different order, and to grant a supersedeas in the meantime. An appeal was taken to the State Supreme Court and a supersedeas was applied for; but it was refused. Thereupon, pending the decision of the appeal by the State Supreme Court, the plaintiff filed a bill asking for injunctive relief upon constitutional grounds.

A three judge court refused a preliminary injunction, believing that it was required to do so by the decision in the **Prentis Case.**

This Court in an opinion by Mr. Justice Holmes reversed the court below. It held that the three-judge court had jurisdiction and that relief ought to have been given to the plaintiff.

This is one of the exceptional cases in which an injunction was held proper, even though the State administrative procedure had not been completed. The refusal of the State Supreme Court to grant a supersedeas was held to justify this course, because of the injury which the plaintiff would sustain if the injunction were not granted.

In **Porter v. Investors Syndicate**, 286 U. S. 461 (1932) a Minnesota corporation was granted a license under the Montana "Blue Sky Law". Subsequently the state officer charged with the enforcement of the law made an order for-

bidding the appellee to do a certain type of business and threatening to revoke his license unless he obeyed the order.

The licensee brought a bill before a three-judge court to restrain the state officer from revoking its license alleging that the state officer's action would deprive him of property without due process of law.

From decisions of the state officer the state law permitted a review by the State district court, which was given authority to "set aside, modify or confirm said . . . decision as the evidence and the rules of equity may require." The case was taken to the district court by bill in equity. From the district court an appeal was allowed to the Supreme Court of the State.

This Court in an opinion by Mr. Justice Roberts held that the application for injunction to the United States District Court was premature.

At page 471, Mr. Justice Roberts said:

> "The present case is not one in which the review of the commissioner's action is judicial in character. If it were, the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a judicial review in the state courts would apply. See Bacon v. Rutland R. Co., 232 U. S. 134; Prendergast v. New York Tel. Co., 262 U. S. 43; Railroad Commission v. Duluth St. Ry. Co., 273 U. S. 625. As we have seen, under the Montana statute the administrative proceeding is not complete until the court shall have acted in revision and correction of the commissioner's decision. . . ."

As we have already pointed out, another exception to this rule was made in **City Bank Farmers Trust Co. v. Schnader.** But that was because this Court held that the Pennsylvania inheritance tax procedure ceased to be admin-

istrative as soon as the appraisement was made by the taxing officer; the officer had unequivocally declared his intention of making the appraisement; and the valuation was admittedly correct.

See also **Central Kentucky Natural Gas Co. v. Railroad Commission**, 37 F. (2d) 938 (D. C. Ky., three-judge court, 1930); **Schlosser et al. v. Welsh**, 5 F. Supp. 993 (D. C., So. Dak., three-judge court, 1934); **Grandin Farmers' Co-Op. Elevator Co. v. Langer**, 5 F. Supp. 425 (D. C., No. Dak., three-judge court, 1934); and **Hegeman Farms Corporation v. Baldwin**, 6 F. Supp. 297 (D. C., S. D. N. Y., three-judge court, 1934).

These cases involved, respectively, gas rates, an income tax law, an executive proclamation regulating grain elevators, and a milk regulation.

In the **Schlosser Case**, the Court said, at p. 997:

> "Where a state board or tribunal, or successive boards or tribunals, are vested with legislative or administrative powers with reference to taxation or rate fixing, it is settled by the decisions that, before resort may be had to a federal court to enjoin the tax or rate being carried into effect, the legislative or administrative remedies must be first exhausted. Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150; Porter v. Investors' Syndicate, 286 U. S. 461, 52 S. Ct. 617, 76 L. Ed. 1226; Air-Way Electric Appliance Corp. v. Archer (D. C.) 279 F. 878."

III.

DISTINCTION BETWEEN ADMINISTRATIVE (OR LEGISLATIVE) AND JUDICIAL PROCEEDINGS.

This distinction is relatively unimportant in this case; but if, as we contend, the review of the State Tax Commis-

sioner's assessment by both the Ordinary and the Supreme Court of New Jersey was a part of the administrative procedure for correcting the assessment, several questions raised by the appellees immediately disappear.

The appellees contend that the granting of an injunction would violate Section 265 of the Judicial Code.

We have shown that this is not the case even though the proceedings which have been held thus far might be judicial.

The proceedings have culminated in a corrected assessment, but the assessment cannot be translated into an enforceable judgment without the institution of a new and independent action.

However, if the proceedings before the Ordinary and the Supreme Court of New Jersey were administrative, then there cannot be the slightest doubt that an injunction may be granted in these cases without violating Section 265 of the Judicial Code.

The appellees contend that the appellants waited too long to institute proceedings before a three-judge court. They aver that the proceedings had reached a judicial stage and that the appellants must exhaust the State's judicial procedure and cannot now resort to a Federal court.

They also contend that the decision of the Supreme Court of New Jersey is res judicata and bars proceedings in the Federal Court.

We disagree with these contentions even if both the Ordinary and the Supreme Court of New Jersey acted judicially.

But clearly if the Ordinary and the Supreme Court of New Jersey acted administratively there is no merit whatever in the appellees' contentions.

Determination that the New Jersey procedure hitherto had was administrative rather than judicial would simplify the disposition of these appeals.

We believe that the procedure was administrative.

What is the test whether a proceeding is administrative or judicial?

As Mr. Justice Holmes said in the **Prentis Case**, whether proceedings are administrative or judicial "depends not upon the character of the body but upon the character of the proceedings." 211 U. S. at 226.

Thus, proceedings have been held administrative even though conducted before the highest court of a State. **Prentis v. Atlantic Coast Line Company**, 211 U. S. 210 (1908); **Oklahoma Natural Gas Company v. Russell et al.**, 261 U. S. 290 (1923).

And the same cases are authority for the statement that it is immaterial that the courts before which the proceedings came were constitutional courts as distinguished from statutory courts.

The same cases indicate that proceedings may be administrative even though they reached the court by appeal.

And proceedings may be administrative even though they reached the court by bill in equity. **Keller v. Potomac Electric Co.**, 261 U. S. 428 (1922); **Radio Commission v. General Electric Co.**, 281 U. S. 464 (1930); **Porter v. Investors Syndicate**, 286 U. S. 461 (1932).

And a proceeding may be administrative rather than judicial even though it was *inter partes* as distinguished from *ex parte*. **Prentis v. Atlantic Coast Line Company**, *supra*, **Oklahoma Natural Gas Company v. Russell**, *supra*, **Keller v. Potomac Electric Company**, *supra*.

What then are the tests to be applied?

We submit that an analysis of the cases indicates that a proceeding before a court is administrative when the Court is reviewing an action which is part of an administrative or legislative process, and

1. The action of the court is **intended** to be solely a revisory step in the administrative or legislative process. **Butterworth v. Hoe,** 112 U. S. 50 (1884); or

2. The decision of the Court, even though binding upon the legislative or administrative agency whose action is reviewed, is not final and binding upon any other parties before the Court. **Postum Cereal Co. v. California Fig Nut Co.,** 272 U. S. 693 (1927); **Butterworth v. Hoe,** *supra;* or

3. Although the determination to be reached is one calling for affirmative enforcement, the decision of the court cannot be enforced except through an independent judicial proceeding. **Kentucky and I. Bridge Co. v. Louisville & N. R. Co.,** 37 Fed. 567 (1889). Appeal dismissed, 149 U. S. 777 (1892); or

4. When the review extends beyond a mere power to reverse the action of the administrative or legislative agency on the ground that (a) the action exceeds the authority conferred on the agency; or (b) the action was based upon an erroneous principle of law; or (c) the action was based upon a finding of fact made arbitrarily or without supporting evidence; **Federal Radio Commission v. Nelson Brothers Co.,** 289 U. S. 266 (1933); and when the court if it disagrees with the action of the agency reviewed, has the power to perform the same kind of action as the agency

performs, and no more. **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210 (1908); **Keller v. Potomac Electric Power Co.**, 261 U. S. 428 (1922).

In the **Prentis Case**, at page 227, Mr. Justice Holmes said:

> ". . . **the effect of an inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up.** . . . all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals [whose function in the case was held to be legislative] and it had confirmed the rate. **Its action** in doing so **would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called . . .**"

In **Postum Cereal Co. v. California Fig Nut Co.**, *supra*, at p. 698, Chief Justice Taft said:

> ". . . The decision of the Court of Appeals under Section 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. **It is merely an instruction** to the Commissioner of Patents **by a court** which is made part of the machinery of the Patent Office **for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case** as the term case is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal taken under it the same rules which under Section 4914 R. S. apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. Butterworth v. Hoe, 112 U. S. 50, 60; Gaines v. Knecht, 27 App. D. C. 530, 532; Atkins v. Moore, 212 U. S. 285, 291. Neither the opinion nor

decision of the Court of Appeals under Section 4914 R. S., or Section 9 of the Act of 1905, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this Court, which can only review judicial judgments. . . ."

In **Kentucky & I. Bridge Co. v. Louisville, N. R. Co.,** *supra,* at p. 612, the court said:

". . . But does the interstate commerce law undertake either to create an 'inferior court' or to invest the commission appointed thereunder with judicial functions? We think not. While the commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the act designates as the 'recommendation,' 'report,' 'order,' or 'requirement' of the board is neither final nor conclusive; **nor is the commission invested with any authority to enforce its decision or award.** Without reviewing in detail the provisions of the law, we are clearly of the opinion that the commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term. The commission hears, investigates, and reports upon complaints made before it, involving alleged violations of or omission of duty under the act; but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of or against whom its decision is rendered does not yield voluntary obedience thereto. . . ."

In **Radio Commission v. General Electric Co.**, 281 U. S. 464 (1930), this Court considered the function of the Court of Appeals of the District of Columbia in reviewing the decisions of the Radio Commission. The latter court was authorized to examine the record before the Radio Commission, to take additional evidence upon such terms and conditions as it might deem proper, to "hear, review and determine the appeal upon said record and evidence," and to "alter or revise the decision appealed from and enter such judgment as to it may seem just."

The Court held that this provision "does no more than make that court [the Court of Appeals of the District of Columbia] **a superior and revising agency in the same field.**"

Following this decision, Congress amended the Radio Act by limiting the review of the Court of Appeals to "questions of law." The amendatory statute provided "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious."

In **Radio Commission v. Nelson Brothers**, 289 U. S. 266 (1933), it was held that the review by the Court of Appeals under the amended act was of a purely judicial character.

At page 276 Mr. Chief Justice Hughes said:

> ". . . **No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just.** The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determination. . . . Whether the Commission applies the legislative standards validly set up,

> whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. . . . A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. . . ."

In **Keller v. Potomac Electric Power Co.**, *supra,* the District of Columbia Public Utilities Commission was empowered to fix rates of various utilities, make orders as to service, value the utilities, etc. Any person dissatisfied with its determination was authorized to commence a proceeding in the Supreme Court of the District, against the Commission, to vacate, set aside or modify the order. In the particular case, the Commission had not fixed a rate, but had made a valuation of the property of the utility.

This Court held that the action of the Supreme Court of the District was legislative, and not judicial, because it was not limited so as

> "to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the Commission upon which, as a matter of law, its finding can be justified,"

but instead the court was intended to exercise its own opinion, and, as it saw fit, to revise the action of the Commission, and in revising it, to do the same things the Commission was to do. The Court concluded at page 442:

> " . . . We cannot escape the conclusion that Congress intended that the court shall revise the legislative discretion of the Commission **by considering the evidence and full record of the case and entering the order it deems the Commission ought to have made.**"

We have already referred to, and quoted from the opinion in **Porter v. Investors Syndicate**, 286 U. S. 461 (1932). We quote further, p. 468:

> " . . . The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the State district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. **The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. . . .** "

That a court, in tax cases, may have the duty of making an "administrative assessment" was recognized by Chief Justice Taft in **Bohler v. Callaway**, 267 U. S. 479 (1924), at p. 487.

IV.

THE NEW JERSEY ASSESSMENT PROCEDURE.

We have already outlined the New Jersey procedure for the assessment of inheritance taxes. (Ante, p. 16.)

The Function of the State Tax Commissioner.

The assessment is made by the State Tax Commissioner, —an administrative officer. Undoubtedly the assessment is an administrative act.

The Function of the Ordinary.

If a taxpayer is dissatisfied, he may, under Section 18 of the Transfer Inheritance Tax Law (Appendix, p. 123) appeal to the Ordinary.

The Ordinary's action is administrative under the first test stated on page 50.

The action of the Ordinary was intended by the Legislature of New Jersey to be solely a revisory step in the administrative process.

The courts of New Jersey have so held. In **Re Roebling's Estate**, 91 N. J. Eq. 72 (1919), 75; **Miller v. McCtucheon**, 117 N. J. Eq. 123, 175 Atl. 155 (1934); **Bugbee v. Van Cleve**, 99 N. J. Eq. 825 (1926).

In the first case cited, the Court of Errors and Appeals described the Ordinary as a "**legislative agent**" when reviewing inheritance tax assessments.

And in **Miller v. McCutcheon** the same court said:

> " . . . The Ordinary, in exercising the power conferred by the statute (supra) to hear and determine tax questions of this character, **is a statutory agent only**, and the power to review his act, as such, by certiorari is one vested in the Supreme Court by the Constitution and of which power that court cannot be divested by statute. Dufford v. Decue, 31 N. J. L. 302; Flanagan v. Treasurer of City of Plainfield, 44 N. J. L. 118; In re Prudential Ins. Co. of America, 82 N. J. L. Eq. 335 . . . "

Apparently the present case is the first in which the New Jersey authorities ever attempted to take the position that the action of the Ordinary is judicial in character, when he reviews assessments made by the State Tax Commissioner.

To our "Brief Contra Motion to Dismiss" these appeals heretofore filed with this Court, we appended (p. 36) an exact copy of a part of a brief filed by the Attorney General in another case now pending in the court below Attorney General Wilentz there concluded his argument,—to which we respectfully refer the court,—with the following sentence:

> "It is respectfully submitted that the right of review by the Prerogative Court **is simply a rounding-out of the entire legislative or administrative scheme for the assessment and collection of inheritance taxes,** and is such an administrative remedy as must be exhausted by plaintiffs before they may resort to a federal court."

The reasoning on which this conclusion was based is sound, as will appear by a mere reading of the Appendix to our Brief Contra Motion to Dismiss.

The following paragraph from the Attorney General's argument is particularly important (Appendix to Brief Contra Motion to Dismiss, p. 40):

> "The courts of this State have held that the reviewing court (prerogative) designated by Section 18 of the statute is a 'legislative agent' or 'legislative agency'.
>
> "*In re Roebling's Estate,* 91 N. J. Eq. 72, 75, 108 Atl. 359.
>
> "*Bugbee v. Van Cleve,* 99 N. J. Eq. 825, 835, 134 Atl. 646;

"which, incidentally, is a binding interpretation on the federal courts."

We shall not attempt any further argument to sustain the position taken by the highest court of New Jersey and hitherto by the Attorney General of New Jersey.

The Ordinary's function is administrative, not judicial.

The Function of the Supreme Court of New Jersey.

By the application of the third and fourth tests on page 50, the function of the Supreme Court of New Jersey in reviewing tax assessments is administrative and not judicial. And the second test may also be applicable.

The court's decree is not enforceable except through an independent judicial proceeding; and if the Supreme Court disagrees with the assessment made by the State Tax Commissioner, it may re-make the assessment or set it aside.

Whether an assessment confirmed by the Supreme Court can be questioned in a later independent judicial proceeding to collect the tax has never been decided. But in another case now pending in the court below, the Attorney General of New Jersey in his brief states that either in an action of debt to collect the tax, or a proceeding under Section 21 of the Transfer Inheritance Tax Act, "the tax payer may interpose any defense which he might think fit, including his non-liability to the tax in question." (Defendant's Brief in **Edwin C. Nevin et al. v. J. H. Thayer Martin**, Tax Commissioner of the State of New Jersey, et al., U. S. D. C., District of New Jersey, Equity No. 4805, p. 24,—Appendix "B", hereto, p. 128).

And it has been decided that when the taxpayer has failed to appeal to the Ordinary (or to the Supreme Court) and the period for such appeal has expired, he may nevertheless attack the validity of the assessment in a collection proceeding under Section 21 of the Transfer Inheritance Tax Act. **In re Vineland Historical Societ**, 66 N. J. Eq. 291 (1904); **In re Budell**, 100 N. J. Eq. 273 (1926).

We shall demonstrate how tests 3 and 4 (page 50) apply to this situation.

The Transfer Inheritance Tax Act of 1909 is silent as to any proceedings for contesting an assessment made by the State Tax Commissioner subsequent to a review by the Ordinary; but under the Constitution of New Jersey, the Supreme Court of that State is vested with the power to review upon certiorari all tax assessments made by the administrative agencies of the State.

In considering the function of the Supreme Court in reviewing tax assessments, the so-called Certiorari Act of 1907 is of the highest importance.

That act appears at page 127 of the Appendix.

It provides that:

> "In all cases of writs of certiorari now pending or hereafter brought to remove any tax or assessment, . . . or to review the proceedings of any special statutory tribunal, or to review the suspension, dismissal, retirement or reduction in rank of any person holding an office or position . . . from which he is removable only for cause and after trial, the courts shall determine disputed questions of fact, as well as of law, and inquire into the facts by depositions taken on notice, and in such other manner as is according to the practice of the

court; provided, either party may use the testimony taken before the tribunal, board or officer whose action is being reviewed which testimony shall be considered by the court the same as if it had been taken by deposition on notice and either party may take additional testimony. The court may reverse or affirm, in whole or in part, such tax or assessment or other order or proceeding, finding or determination, suspension, dismissal, retirement or reduction in rank reviewed."

The Certiorari Act has been sustained as constitutional. **Royal Manufacturing Company v. City of Rahway,** 75 N. J. L. 416 (1907).

In **Trenton & Mercer County Traction Corporation v. Mercer County Board of Taxation,** 92 New Jersey Law 398 (1918), the Court of Errors and Appeals reversed the action of the Supreme Court of New Jersey in a tax case on the ground that it confined its review of the facts to a consideration of the question whether there was any evidence to support the findings below. Judge Swayze said:

"The Supreme Court took too narrow a view of its functions in this case. It held that the judgment of the county board of taxation was not unreasonably or illegally reached and was supportable upon the facts and the figures adduced before it. This involved merely a determination that there was no erroneous legal principle shown to have been adopted by the county board, and that there was evidence to support its finding. But this determination was not a compliance with the mandate of the Tax Act or of the Certiorari Act. . . .

"Section 11 of the Certiorari Act as amended in 1907 (P. L. 95; 1 C. S. 405), requires the Supreme Court to determine disputed questions of fact in tax cases as well as in other cases therein set forth. . . . In the

present case the Supreme Court failed to make an independent determination of facts, and contented itself with finding that there was a legal basis for the result reached by the county board of taxation whether or not that result was right in fact. This error makes it necessary to reverse the judgment and remit the record to the Supreme Court in order that it may find the facts."

And in **Gibbs v. State Board of Taxes and Assessment,** 101 N. J. L. 371 (1925), Judge Katzenbach speaking for the Court of Errors and Appeals said:

". . . . Under section 11 of the Certiorari Act of 1903, as amended (1 Compiled Statutes of N. J. p. 405), power is given to the Supreme Court to determine disputed questions of fact, as well as law. The Supreme Court did not determine any question of fact as appears from the language of its opinion above quoted. The testimony taken in the case should, in our opinion, be reviewed. The case will therefore be remanded to the Supreme Court with the direction that it determine the disputed questions of fact."

In **Dubelbeiss v. West Hoboken,** 82 N. J. L. 683 (1912), the Court of Errors and Appeals considered the action of the Supreme Court in reviewing on certiorari the dismissal of a policeman by the town council of West Hoboken. The Supreme Court took and considered new evidence, reversed the policeman's dismissal and "ordered him to be restored in all things."

In sustaining the Supreme Court's action, Voorhees, J., speaking for the Court of Errors and Appeals said, at page 685:

"The question therefore is confined to the propriety of the reception and consideration of the additional testimony. The amendment of the Certiorari act of 1907 (Pamphl. L., P. 95) expressly provides for the

taking and consideration of such additional testimony, but aside from that statute, this court has determined that when the investigation of questions of fact is required for the proper review of ordinances or other municipal proceedings, the Supreme Court has power by its constitutional jurisdiction to consider such matters of fact, and that the statute is not the source of the existence of that power. Lighthipe v. Orange, 46 Vroom 365; Affirmed, 47 Id. 817.

"So, too, with reference to the entry of the judgment in the Supreme Court without ordering a new trial before the town council. The Supreme Court was right in ordering not only a judgment of reversal, but may enter such new judgment in that court as it appeared by the record that the tribunal below ought to have rendered. This is in consonance with the practice adopted by the Court of King's Bench and which has been approved by this court. State, Hoxsey, pros., v. City of Paterson, 10 Vroom 489; Smith v. Ocean Castle, 30 Id. 198.

"In addition, however, to this right, there is also the statutory warrant contained in the act of 1907, supra, for such judgment. That act provides that 'the court may reverse or affirm in whole or in part such . . . findings or determination, suspension, dismissal . . . reviewed.' "

In **Kearny v. State Board,** 103 N. J. L. 26 (1926), the Court of Errors and Appeals held that it was not obligatory upon the Supreme Court to set up such assessment as it felt proper, but that it might correct the assessment or set it aside and remand the case to the administrative agency for further proceedings.

But, in order to render the procedure administrative, the revision of the assessment by the court need not be mandatory.

In **Porter v. Investors Syndicate**, 286 U. S. 461 (1932), **Radio Commission v. General Electric Co.**, 281 U. S. 464 (1930) and **Prentis v. Atlantic Coast Line**, 211 U. S. 210 (1908), the phraseology of the statute rendered revision of the administrative or legislative action permissive only; but the court's function was nevertheless held to be administrative, and not judicial.

The function of the Supreme Court of New Jersey in assessment cases parallels exactly that of the Court of Appeals of the District of Columbia in passing on appeals from orders of the Radio Commission under the original Radio Act.

The court reviews the record of the State Tax Commissioner both as to fact and as to law; it may, on its own motion, cause additional testimony to be taken; it may permit the parties to take additional testimony; and it may re-make the assessment.

By no stretch of the imagination could the proceeding be regarded as an ordinary appeal.

The New Jersey procedure differs entirely from that of Pennsylvania, which was before this court in **City Bank Farmers Trust Company v. Schnader, et al.**, 291 U. S. 24 (1934).

Under the Pennsylvania procedure when an appeal is taken from an assessment made by the Register of Wills there is a hearing *de novo* in the Orphans' Court. At that hearing, as Mr. Justice Roberts said:

> "The Commonwealth becomes plaintiff and the taxpayer defendant, and the action is tried as an ordinary action, resulting in a judgment, which is final

and binding on the parties, subject only to appeal to a higher State court, as permitted by the act."

A typical illustration of the result of a Pennsylvania inheritance tax appeal is the judgment entered by the Court of Common Pleas of Dauphin County in **Commonwealth v. Johnston**, Executor, 25 Dauphin County Reports 404 (1922), at p. 409. It is:

> "Therefore, judgment is hereby directed to be entered in favor of the Commonwealth and against William Armour Johnston, Jr., Executor of the estate of William A. Johnston, Deceased, in the sum of $3649.83, unless exceptions be filed within the time limited by law."

Compare the decrees of the Prerogative Court (R. 99) and of the Supreme Court of New Jersey (R. 156) in the proceedings upon which appellees rely to defeat the jurisdiction of the court below.

An inheritance tax appeal in Pennsylvania becomes an ordinary trial of an issue, culminating, if the State wins, in a money judgment.

In New Jersey, an appeal to the Ordinary and later to the Supreme Court of New Jersey is merely an administrative review of the action of an administrative officer in making an assessment.

The Pennsylvania appeal ends in a **judgment.**

The New Jersey appeals end in an **assessment.**

The New Jersey procedure also differs materially from that which came before the Court in **Old Colony Trust Company, et al., v. Commissioner of Internal Revenue**, 279 U. S. 716 (1929).

That case involved the action of the Circuit Court of Appeals in reviewing determinations of the Board of Tax Appeals.

The Act (February 26, 1926, C. 27, Section 1003, 44 Stat. 110, 26 U. S .C. A., Section 1226), providing for review by the Circuit Courts of Appeals is simple and explicit. It provides:

> "Upon such review, such courts shall have power to affirm or, if the decision of the board is not in accordance with law, to modify or reverse the decision of the board, with or without remanding the case for a rehearing, as justice may require."

The authority of the court is strictly limited to affirmance, or to modification or reversal only in case the decision of the Board is not in accordance with law. The court is limited to a review of errors of law; its review of the facts can go no further than a determination whether there was substantial evidence to support the conclusion which the board has reached.

The case is the clear parallel of **Federal Radio Commission v. Nelson Brothers Co.**, *supra.*

But there are further apparent distinctions.

The action of the Court of Appeals (subject to review by certiorari in this Court) is final. Act of February 26, 1926, C. 27, Section 1003, 44 Stat. 110, 26 U. S. C. A. 1226, sub-section a.

And the final decision of the court is directly enforceable, without the intervention of any further judicial proceeding. See 279 U. S. at pages 725 to 727.

Clearly, the procedure before the Supreme Court of New Jersey is in the nature of an administrative review and is not a judicial proceeding.

V.

RES JUDICATA CANNOT BE SUCCESSFULLY PLEADED.

Appellees in their Answers (R. 51, 524), set up a plea of res judicata.

We submit that the plea is not good because:

1. To date the proceedings before the State Tax Commissioner, the Ordinary, and the Supreme Court of New Jersey have been administrative and not judicial in character;

2. Assuming for the sake of the argument, that the decision of the Supreme Court of New Jersey was judicial in character, it was not a final judgment of the highest court of a State, and the executors-appellants have not acquiesced in it;

3. Under the peculiar circumstances of this case, the usual rules of comity between Federal and State courts do not apply; and

4. Under the circumstances of this case, the appellant Mrs. Hill, who was not a party to the proceedings in the Supreme Court of New Jersey, should not be held in privity with the executors, as far as this litigation is concerned.

Administrative Review Is Not Res Judicata.

Assuming that the Court agrees with us that the New Jersey proceedings challenging the assessment have been administrative, the first reason is so obvious that argument in support of it would be superfluous.

Clearly an administrative review by a State court of an administrative act, cannot be pleaded as res judicata in a Federal court. **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210 (1908), 227.

If the Court agrees with our conclusion that the review of tax assessments on certiorari by the Supreme Court of New Jersey is administrative, our first reason is the only one which requires consideration.

If, however, the Court should not agree with us, nevertheless we submit that the decision of the Supreme Court of New Jersey is not res judicata as far as Federal proceedings are concerned.

The Decision of the Supreme Court of New Jersey Is Not a Final Judgment as Far as the Federal Courts Are Concerned.

In **Grubb v. Public Utilities Commission**, 281 U. S. 470 (1930), Grubb applied to the Public Utilities Commission of Ohio for a certificate to operate a line of passenger buses over certain public highways in Ohio as part of an interstate route. A hearing was had before the Commission, after which the requested certificate was granted; but it excluded a part of the route.

Thereupon Grubb applied for a re-hearing which was denied. Then Grubb brought a bill in equity against the Commission in the District Court of the United States under Section 266 of the Judicial Code, charging that the Commission's order was in violation of the Commerce Clause of the United States Constitution.

While the suit in the District Court was pending, the Supreme Court of Ohio rendered a decision sustaining the Commission's action.

We quote Mr. Justice Van Devanter's language at page 475:

> "After a hearing in which all of the parties participated the state court rendered a judgment sustaining and affirming the Commission's order in its entirety. 119 O. S. 264. **No effort was made to have that judgment reviewed by this Court, and after the three months allotted for applying for such a review had elapsed,** the defendants in the suit in the District Court, by leave of that court, interposed answers setting up the judgment as a bar to the further prosecution of the suit. A hearing upon this plea resulted in the decree now under review, which sustained the plea and dismissed the bill."

This Court sustained the action of the District Court. Mr. Justice Van Devanter said at page 476:

> "It next is said that the suit in the federal court was begun before resort was had to the state court, and therefore that the jurisdiction of the federal court was exclusive and precluded action in the state court. In this the appellant is invoking a rule which is applicable to suits dealing with specific property and involving actual or potential control over the same, where necessarily the court (whether federal or state) first obtaining jurisdiction of the res must hold it to the exclusion of another. Here the litigation was not of that class, but was of such a nature that it could proceed in both courts, in virtue of their concurrent jurisdiction, until there was **a final judgment** in one, Kline v. Burke Construction Co., 260 U. S. 226, when that judgment would become conclusive in the other as res judicata. Chicago, Rock Island & Pacific Ry. Co. v. Schendel, 270 U. S. 611, 616; Insurance Co. v. Harris, 97 U. S. 331, 336."

In **American Surety Company v. Baldwin**, 287 U. S. 156 (1932), the Surety Company sought to be relieved from

a judgment in favor of the Baldwins entered by an Iowa court and sustained by the Supreme Court of Iowa.

Suit was brought in the United States District Court for an injunction to stay execution on the judgment. The District Court refused the injunction and dismissed the bill. This Court, in an opinion by Mr. Justice Brandeis, sustained this action. At page 164 Mr. Justice Brandeis stated the reason for the decision as follows:

> ". . . For the Federal remedy was barred by the proceedings taken in the State court **which ripened into a final judgment** constituting res judicata."

In **Betts v. Railroad Commission of California**, 6 F. Supp. 591 (1933), a three-judge court (Wilbur, C. J., and McCormick and Cosgrave, D. JJ.), denied an interlocutory injunction because a final judgment had been rendered by the Supreme Court of California. At page 592, the Court said:

> "It is plain therefore that plaintiff presents here the identical questions passed upon by the Supreme Court of California, **and the decision of that court is now final**, and the matters therein adjudged cannot again be presented to any court for determination. . . ."

In **Eastern Building & Loan Ass'n of Syracuse v. Welling**, 103 Fed. 352 (D. C. S. C. 1900), a bill was filed in the federal district court to reform and foreclose a mortgage, which, it was alleged, owing to a mistake, did not include the entire contract. The defendant had previously brought an action against the plaintiff in the State courts under a State statute, giving a cause of action to a mortgagor against a mortgagee failing to enter satisfaction of a mortgage under which all obligations were performed.

The State court had sustained defendant, had been sustained by the highest court of the State, and plaintiff on certain constitutional grounds had petitioned for a writ of error from the Supreme Court of the United States. Defendant set up the judgment in the State court as a bar to the bill in the Federal court. This contention the Federal court overruled, saying, at p. 355:

> ". . . Assuming, for the sake of argument, that the controversy set up in this bill of complaint is the same as that which was agitated in the proceedings in the state court between these same parties, it cannot be said that the question is res judicata. The pleadings disclose the fact that the final judgment of the state supreme court has been removed by writ of error into the supreme court of the United States, and that it awaits adjudication in that court. Were it now held that the issue is res judicata,—a question finally settled beyond controversy,—the decision of the supreme court may perhaps be anticipated, or its conclusion be antagonized. **No controversy can be treated as res judicata until it has been finally discussed and decided in a court of last resort, or the result has been acquiesced in without resort to such a tribunal.** . . ."

In **Tampa Waterworks Co. v. City of Tampa**, 124 Fed. 932 (S. D. Fla. 1903), plaintiff had brought an action in a State court to restrain the city from enforcing an ordinance fixing rates allegedly infringing plaintiff's contract. The State trial court had overruled the city's demurrer and granted the injunction. The State Supreme Court, however, reversed the judgment, ordered the trial court to sustain the demurrer and permit further proceedings. The trial court thereupon dismissed the bill and plaintiff appealed to the State Supreme Court in order that it might render a final decision from which a writ of error might be

prosecuted to the Supreme Court of the United States. Pending such appeal plaintiff sought in a three-judge court an injunction against enforcement of the ordinance. The city contended that the State proceeding was a bar to the Federal proceeding. The contention was overruled on the ground that there was as yet no final decision of the Supreme Court of the State which could operate as res judicata. At page 936 Judge Pardee said:

> ". . . . *Lis pendens* in a state court does not bar proceedings between the same parties on the same cause of action in the federal courts. . . ."

In **McWilliams v. Hopkins**, 11 F. (2d) 793 (S. D. Cal., 1926) an action was brought in a Federal district court to determine rights under an oil lease. In opposition to the action it was set up that rights in the oil had been determined in an action between the same parties in an inferior State court. With reference to this contention the United States district court said, at page 796:

> "In the affidavits filed in opposition to the showing of plaintiffs on the application for the appointment of a receiver, it appears that in an action . . . tried in the superior court of Los Angeles county . . . the superior judge determined, under the particular contract here involved, that plaintiffs had no interest in the oil. That decision, so far as can be understood from the pleadings and judgment, was a direct adjudication against the very construction that plaintiffs are seeking to have enforced in this action. Judgment in that action is not yet final, and the cause is pending on appeal. If affirmed on appeal, that adjudication will be considered binding here; but **until it is final, it is a cause pending**, and not ground for abatement in the federal court. Counsel for plaintiffs have cited decisions of the Supreme Court clearly establishing that law."

In this case, the decision of the Supreme Court of New Jersey is not final, even though it be held judicial in character.

The executors have until February 11, 1936, to take their appeal to the Court of Errors and Appeals.

On February 13, 1935, they notified the State Tax Commissioner, informally, that they intended to appeal (R. 31).

They intend to appeal, unless the present action shall render an appeal unnecessary (R. 31).

In explanation of the executors' failure to have appealed as yet, a court of equity will undoubtedly consider as highly important the following circumstance which is before this Court.

By Act of the New Jersey Legislature the State Tax Commissioner was authorized to adjust the claimed tax against the Dorrance Estate "by the acceptance of the principal sum due and the remission of all interest due on such principal sum" (R. 25).

On February 15, 1935, the defendant State Tax Commissioner threatened the executors that if they prosecuted the New Jersey litigation to a finality he would refuse any relief in interest charges should the litigation result in the affirmance of the assessment. His letter stated that the amount of interest then due was $4,145,713.70 (R. 25).

This threat to penalize the estate if it took an appeal to the highest court of New Jersey is certainly sufficient to justify the executors in delaying the appeal.

This threat was tantamount to a demand that the executors pay the tax claimed by New Jersey whether it is constitutionally due or not. In substance **a penalty of more than $4,000,000 was threatened if the executors of the estate**

submitted the validity of the tax to the highest court of New Jersey.

In the court below, appellees cited text-books and cases to controvert our argument under this heading.

But appellees' argument overlooked the distinction between the applicability of the doctrine of res judicata in courts of the same jurisdiction, and its applicability as between Federal and State courts.

That distinction disposes of the text-book citations.

Of course it is true that if a judgment has been rendered by a New Jersey trial court, the same plaintiff cannot thereafter start another suit in another trial court in the same state, even though there is an appeal pending from the judgment rendered in the first suit. The parties must exhaust their appellate remedies in the first case and cannot, over objection, resort to a different tribunal of the same state for a retrial of the case.

But the situation is entirely different when the defendant in a Federal court attempts to plead a judgment of a State court as res judicata to bar further proceedings. He must show, as Judge Simonton said, that the State judgment is that of a court of last resort or else that the parties have acquiesced in the judgment of an inferior tribunal by not seeking a review in a higher court within the time allowed for such review.

Appellees in the court below cited **Detroit and Mackinac Railroad Company v. Michigan Railroad Commission**, 235 U. S. 402 (1914); **Napa Valley Electric Company v. Railroad Commission**, 251 U. S. 366 (1920); **State Corporation Commission of Kansas v. Wichita Gas Company**, 290

U. S. 561 (1934); and **Tait v. Western Maryland Railway Company**, 289 U. S. 620 (1933).

In all of these cases the State court decisions held to be res judicata were decisions of courts of last resort.

In **Detroit and Mackinac Railroad Company v. Michigan Railroad Commission**, 235 U. S. 402 (1914), the review by the Supreme Court of Michigan of the action of the Railroad Commission was held to be judicial. The parties had carried their case to that court and there had been a decision. Thereafter it was sought to present the same controversy to the Federal courts. Res judicata was properly pleaded successfully.

In **Napa Valley Electric Company v. Railroad Commission**, 251 U. S. 366 (1920), the plaintiff had carried its case to the highest court of California and that court had refused to review the action of the Railroad Commission. This Court held that such refusal constituted a judgment by the highest court of the state and accordingly sustained the plea of res judicata.

In **State Corporation Commission of Kansas v. Wichita Gas Company**, 290 U. S. 561 (1934), a bill in equity was filed in the District Court to set aside an order of the State Corporation Commission which this Court found was merely a preliminary step in aid of investigations for the ascertainment of the reasonableness of the gas company's rates.

At page 569, Mr. Justice Butler said:

> ". . . The order is therefore legislative in character. The Commission's decisions upon the matters covered by it cannot be res adjudicata when challenged

in a confiscation case or other suit involving their validity or the validity of any rate depending upon them . . ."

Obviously the decision has no bearing on the present controversy.

In **Tait v. Western Maryland Railway Company**, 289 U. S. 620 (1933) the question was whether a previous decision by a District Court, affirmed by the Circuit Court of Appeals, barred a second suit in the District court involving exactly the same tax question but for a different year. There can be no doubt of the correctness of this Court's decision that the judgment in the first suit barred a retrial of the identical question; and the case is a perfect illustration of the distinction between the plea of res judicata in courts of the same jurisdiction and the plea as between Federal and State courts.

In view of the **Napa Valley Electric Company Case**, this Court's action in **Lehigh Valley Railroad Company v. Board of Public Utility Commissioners et al.**, 278 U. S. 24 (1928) is most interesting and pertinent.

The New Jersey Board of Public Utility Commissioners made an order requiring the Lehigh Valley Railroad Company to eliminate two grade crossings in Somerset County, New Jersey.

The Company, represented by special counsel for the appellees in the present cases, applied to the Supreme Court of New Jersey for writ of certiorari, and a restraining order.

The Supreme Court denied the certiorari.

Then the Railroad applied to a three-judge court for an injunction.

After hearing, the three-judge court dismissed the bill.

On appeal this Court decided the controversy on the merits.

We submit that, clearly, the decision of the Supreme Court of New Jersey,—a decision in which the executors of the Dorrance estate have not acquiesced, and which may still be appealed to a higher court of New Jersey,—is not res judicata here even though it be held to have been judicial in character.

Neither Comity Nor Public Policy Requires a Plea of Res Judicata to Be Accepted in This Case.

The full faith and credit clause of the Constitution does not apply to the Federal courts. **Baldwin v. Iowa State Traveling Men's Association,** 283 U. S. 522 (1931).

Therefore, recognition by the Federal courts of a State court judgment, is a matter of comity, based upon public policy.

In this case, comity did not influence the Supreme Court of New Jersey to recognize a judgment of the Supreme Court of Pennsylvania.

That judgment was before the New Jersey court. It had been made a part of the record without objection on behalf of the State authorities. And it adjudicated the question whether Dr. Dorrance was domiciled in Pennsylvania at the date of his death.

By way of excuse for ignoring the Pennsylvania judgment, the Ordinary (R. 85), after admitting that the Pennsylvania inheritance tax proceeding was *in rem,* held that

> ". . . When it is demanded of the Courts of one State that full faith and credit be accorded to the judg-

ment of the Court of a sister State, 'an inquiry into the jurisdiction (of the latter Court) is always permitted, and if it be shown that the proceedings relied upon were without the jurisdiction of the Court, they need not be respected.' . . .

"Concededly, the Courts of Pennsylvania had no jurisdiction to assess and levy the tax in question unless the decedent was domiciled in Pennsylvania. It is therefore open to this Court, in the exercise of its right to inquire into the jurisdiction of the Pennsylvania Court, to inquire into, ascertain and determine whether or not the decedent was domiciled in Pennsylvania. . . ."

This conclusion was affirmed by the Supreme Court of New Jersey (R. 156).

If the Pennsylvania proceedings were *in rem*, and if the New Jersey proceedings eventuated in a judgment for inheritance tax (which we deny), the latter was also *in rem*.

If the New Jersey courts could properly inquire into the facts of domicile, before determining whether a judgment of the Supreme Court of Pennsylvania should be recognized, surely the Federal courts can do likewise before determining whether the decree of the Supreme Court of New Jersey (if it is a judgment), should be recognized.

It is a poor rule which does not work both ways!

And in any event, as Mr. Justice Holmes said in the **Prentis Case**, at 211 U. S. 293,

". . . Rules of comity or convenience must give way to constitutional rights . . ."

Clearly the Federal courts are not compelled by constitutional mandate, to recognize as res judicata, the judg-

ment of a court of intermediate appeal of a State, when the State law permits a further appeal, and the losing parties have unmistakably signified their intention of taking such appeal within the time allowed by law.

In this case the threat of the State Tax Commissioner of New Jersey, (R. 25) that he would penalize appellants for "any further prosecution of the litigation," amply justified the executors in seeking immediate relief in the Federal courts.

The recognition of final State court judgments as a bar to litigation in the Federal courts, rests upon the sound public policy that there should be an end to litigation.

But refusal of injunctions in these cases will not have that effect.

The course of litigation will not have come to an end, if injunctions be refused in these cases. It will be much longer than if the court below be directed to proceed to a hearing.

And, in the former event, should the case reach this Court,—either at the conclusion of the assessment proceedings or at the conclusion of the collection proceedings, or both,—it would be compelled to review the facts and the law to reach a conclusion as to the domicile of the decedent.

The most expeditious ending of the litigation will be through a hearing in the court below, and a subsequent review by this Court of the three-judge court's action.

In **Prentis v. Atlantic Coast Line**, 211 U. S. 210 (1908), Mr. Justice Holmes said, at page 228:

> ". . . If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already

found against them. But the determination as to their rights turns almost wholly upon the facts to be found. . . ."

And in **Willcox et al. v. Consolidated Gas Company**, 212 U. S. 19 (1909), at p. 40, Mr. Justice Peckham, in discussing the **Prentis Case**, said:

". . . In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent. . . ."

The present case is one which ultimately turns on the facts found. Appellants have a right to have the facts found by a Federal court, under the circumstances here present.

Thus far there has been no trial at which evidence was taken by a court, except in Pennsylvania. This is not a case in which, after a trial in a State court, the plaintiffs are seeking to shift to a Federal court.

There has been no trial in New Jersey.

And, we submit, the appellants are entitled to their day in court on the facts of this case.

As to Appellant Mrs. Hill.

Appellant Mrs. Hill is a legatee of the decedent. Against her interest in the estate an assessment has been made in the sum of $1,566,925.01 (R. 29).

Collection of the claimed tax by the appellees, will deprive her of income greatly exceeding $3,000 (R. 29).

And between Mrs. Hill and appellees, diversity of citizenship exists (R. 3).

Clearly if she has a right to maintain an independent action, she is not bound by the litigation heretofore conducted by the executors in New Jersey.

We later discuss Mrs. Hill's right to maintain her suit. See page 106.

Probate Is Not Res Judicata.

In the court below, appellees contended, in varying language, that the Surrogate of Burlington County made a finding, or adjudicated, or decided "on the question of domicil that the domicil of the decedent was in Burlington County, New Jersey".

The Surrogate did nothing of the kind.

His "Order for Probate" appears at R. 131. It will be read in vain to find any expression on the question whether decedent was domiciled in New Jersey.

In addition, probate of the will in this case was ex parte; and the appellant Elinor Dorrance Hill was not a party to the proceedings.

That an order for probate cannot be res judicata on the question of domicile has been squarely decided by this Court.

In **Thormann v. Frame**, 176 U. S. 350 (1900), it was held that the issuance of letters of administration by a probate court in no sense precluded a later determination of the decedent's domicile (in that case for the purpose of determining the validity of decedent's will). The Court said, at page 354:

> ". . . the proceeding . . . amounted to no more than an *ex parte* application for letters of administra-

tion and a grant thereof. . . . nor can the bare appointment be held, on principle or authority, to foreclose inquiry into the fact of domicil in the courts of another sovereignty."

In addition, it was held that the appointment was in any event open to inquiry as to the jurisdiction of the appointing Court.

This decision was followed in **Baker v. Baker, Eccles & Company**, 242 U. S. 394 (1917).

Both the result and the language in **Thormann v. Frame** are applicable to the situation here. Appellees admit that unless decedent died domiciled in Burlington County the Surrogate was without jurisdiction. The proceeding was ex parte; no contest of decedent's domicile was made.

The only cases in which an allowance of probate has been held to bar later collateral proceedings are those in which persons securing, or not contesting probate, were prevented from attacking the decree of probate by contesting the validity of the will. The estoppel is not by judgment, but by conduct in the course of what amounts to a continuous and single subject of litigation. Such a rule can obviously have no relation to an action to determine liability to tax, an action in no sense connected with the will, its validity, or the propriety of its probate.

In **In re Mesa's Estate**, decided by the Surrogate in 149 N. Y. S. 536 (1914), affirmed by the Appellate Division in 159 N. Y. S. 59 (1916), and by the Court of Appeals in 219 N. Y. 566 (1916), the New York courts squarely held that the fact that probate of a will had been allowed in New York was without relation to the question (raised in the

New York courts), whether the decedent was domiciled in New York for purposes of assessment of a transfer inheritance tax. It was pointed out by the Surrogate (149 N. Y. S. at page 544) that

> "The proceeding to fix the transfer tax is an independent proceeding. It is a familiar rule of procedure in courts of justice that parties to the same proceeding are not permitted in the same proceeding to take inconsistent positions at the same moment. This is only the paraphrase of the fundamental canon of logic on which all accurate reasoning and procedure are based, that the same proposition or affirmative assertion cannot at the same time be true and not true, exist and not exist. In other words, contradictories are incompatible at the same moment. But this rule does not prevent an inquiry into the real domicile in this proceding."

And the Appellate Division (159 N. Y. S. at page 65) pointed out that in cases cited to sustain the contention that probate was a bar:

> ". . . the plaintiffs in the respective actions were attacking the jurisdiction of the Surrogate's Court and seeking to treat as a nullity its decree. No right which they sought to assert could be maintained as long as the decrees in question remained in full force and effect. Here the respondent does not attack the jurisdiction of the Surrogate's Court of New York county nor seek to set aside, disregard, nor in any way qualify or limit the decree admitting the decedent's will to probate. . . ."

Moreover, the situation here presented is in another particular definitely distinguished from cases in which probate has been held a bar. In such cases the bar is set up only as between parties interested in the probate proceeding.

Here it is sought to be set up by the State of New Jersey, an utter stranger to the probate proceeding. In

In re Mesa's Estate, the Appellate Division observed (159 N. Y. S. at pages 66-67),

". . . Furthermore, the state of New York was not a party to the proceeding for the probate of the decedent's will. In the cases relied on by appellant the question of estoppel arose between those who had either been parties to the original decree or privies of such parties.

"Estoppel has been defined as:

"'An admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies.' Sly v. Hunt, 159 Mass. 151, 34 N. E. 187, 21 L. R. A. 680, 38 Am. St. Rep. 403.

"In relation to judgments the rule is as follows:

"'As a memorial of the fact of the rendition of judgment the record imports absolute verity, and may be impeached by no one, whether or not a party to the proceeding in which it was made. As a judgment, on the other hand, the record has the further effect of precluding a re-examination into the truth of the matters decided; but in this aspect it is a rule binding only on parties to the proceeding and their privies. This further and secondary effect of the record considered as a judgment is otherwise known as estoppel by judgment, the matters adjudicated being termed res adjudicata.' 16 Cyc. 685."

And in **Brigham v. Fayerweather**, 140 Mass. 411 (1886), Mr. Justice Holmes held that an allowance of probate could not be set up as foreclosing the question of testator's mental capacity by one seeking to maintain the enforcibility of a contract made by the decedent, saying (at page 414),

". . . Still less do we see why, if the probate is not evidence against a party who had no right to be heard, he should hold the executor bound by it when he himself is free. Ordinarily, estoppels by judgment are mutual."

VI.

THE LAW OF DOMICILE.

The rules governing the acquisition of a new domicile by an individual are clear-cut. They have been established by a line of decisions of this Court extending over a period of many years. In general they are to the effect that a change of domicile arises when an individual establishes his dwelling place and family home at the new location, without any present intention of changing it to another place, or, stated differently, without any present intention of not residing there indefinitely. The fact of residence, and the requisite intention to remain there indefinitely must concur.

These rules find their roots in **Shelton v. Tiffin**, 6 How. 163, 185 (1848); **Ennis et al. v. Smith et al.**, 14 How. 400 (1852), particularly at page 422, and **Mitchell v. United States**, 21 Wall. 350 (1874), where at page 353, Justice Swayne said:

> "To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary."

For other cases to the same effect, see **Chicago & Northwestern Railway Co. v. Ohle**, 117 U. S. 123 (1886); **Morris v. Gilmer**, 129 U. S. 315, 328 (1889); **Sun Printing and Publishing Association v. Edwards**, 194 U. S. 377, 383 (1904); and

particularly, **Williamson v. Osenton**, 232 U. S. 619, 624, 625 (1914).

The latest expression of this Court on this subject was in **Gilbert v. David**, 235 U. S. 561 (1915). At page 569 Mr. Justice Day said:

> "This matter of domicile has been often before this court, and was last under consideration in the case of Williamson v. Osenton, 232 U. S. 619, *supra* In that case the definition of domicile, as defined by Mr. Dicey, in his book on 'Conflict of Laws,' 2d ed., 111, is cited with approval. There change of domicile is said to arise where there is a change of abode and 'the absence of any present intention to not reside permanently or indefinitely in the new abode.' Or, as Judge Story puts it in his work on 'Conflict of Laws,' 7th Ed., sec. 46, page 41, 'If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period.' 'The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely.' Price v. Price, 156 Pa. St. 617, 626."

The concluding paragraph of the opinion is as follows:

> "It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut should he succeed in disposing of it for what he considered it worth. But as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circum-

stances shown, from becoming his domicile. **It was his place of abode which he had no present intention of changing, that is the essence of domicile."**

Since the decision in **Gilbert v. David**, *supra*, was handed down in 1915, it has been cited in a great many cases as the leading Federal authority upon the subject of change of domicile.

For examples, see:

Pass v. United States, 256 Fed. 735, 737 (C. C. A. 9th, 1919); **United States v. Knight**, 291 Fed. 129, 134 (D. Mont., 1923); **Stockyards National Bank v. Bragg**, 293 Fed. 879, 883 (C. C. A. 8th, 1923); **Edwards v. United States**, 7 F. (2d) 357, 361 (C. C. A 8th, 1925); **Bowring v Bowers**, 24 F. (2d) 918, 920 (C. C. A. 2nd, 1928); and **Rosenberg v. Commissioner of Internal Revenue**, 37 F (2d) 808, 810 (App. D. C., 1930).

The rules established by this Court are applied almost universally both in this country and abroad. They are in accord with the principles adopted by the American Law Institute, May 11, 1934, in its **Restatement of the Law of Conflict of Laws.** The following sections of the Restatement enunciate the rules governing change of domicil:

"Sec. 15. **Domicil of Choice.**

"(1) A domicil of choice is a domicil acquired, through the exercise of his own will, by a person who is legally capable of changing his domicil.

"(2) To acquire a domicil of choice, a person must establish a dwelling-place with the intention of making it his home.

"(3) The fact of physical presence at a dwelling-place and the intention to make it a home must concur;

if they do so, even for a moment, the change of domicil takes place.

"(4) A person can acquire a domicil of choice only in one of three ways:

"(a) having no home, he acquires a home in a place other than his former domicil;

"(b) having a home in one place, he gives it up as such and acquires a new home in another place;

"(c) having two homes, he comes to regard the one of them not previously his domicil as his principal home."

"Sec. 16. **Requisite of Physical Presence.**

"To acquire a domicil of choice in a place, a person must be physically present there; but a home in a particular building is not necessary for the acquisition of a domicil."

"Sec. 18. **Requisite of Intention.**

"A person cannot change his domicil by removal to a new dwelling-place without an intention to make the new dwelling-place his home."

"Sec. 19. **Nature of Intention Required.**

"The intention required for the acquisition of a domicil of choice is an intention to make a home in fact, and not an intention to acquire a domicil."

The following illuminating comment upon this section appears at page 38:

"Comment:

"**a. Intention to make home and desire to acquire domicil.** A person sometimes desires to have his domicil in a certain place, in order to get the benefit of one or more of the legal consequences of having a domicil

there, but does not wish to change his home to that place; this desire to have a domicil in a certain place has no effect in fixing his domicil there. So, too, the desire to retain an old domicil is not controlling if in fact a new one has been acquired under the rules stated . . ." in this Restatement.

"Sec. 20. **Present Intention.**

"For the acquisition of a domicil of choice the intention to make a home must be an intention to make a home at the moment, not to make a home in the future."

The cases we have cited and the sections of the **Restatement** just quoted establish conclusively that the tests to be applied in determining whether a change of domicile of an individual has been effected are principally two in number; (1) establishment of his principal home in the new place, (2) without any present intention not to reside there indefinitely. Consequently, when the deceased in the present case established his principal family home in Radnor without any present intention not to reside there indefinitely, he could not, by following the simple expedients of declaring in various instruments, including his will, that he was domiciled in New Jersey and of continuing to vote in New Jersey, prevent the change of his legal domicile to Pennsylvania. And this is the more obvious, when the apparent purpose of the declarations and the voting is to prevent the change of domicile despite the acquisition of a new principal home with the requisite intention to remain there indefinitely. No doctrine in the law of domicile is more clearly established than the rule that a mere desire to have a domicile in one place, however frequently expressed, cannot overcome the legal effect of a man's acts and intention which result in a domicile elsewhere. As

has been so well said in the comment to Section 19 of the **Restatement**, a person's "desire to have a domicil in a certain place has no effect in fixing his domicil there. So, too, the desire to retain an old domicil is not controlling if in fact a new one has been acquired under the rules stated . . ."

We make mention here of **In the Matter of the Estate of James A. Trowbridge** (The State of Connecticut, Appellant; The State Tax Commissioner of New York, Respondent), 266 N. Y. 283 (1935) because its facts are almost identical with those of the present case and because the decision is probably the latest authoritative statement by a leading State court following the general rules of change of domicile. There the decedent had voted in New York, attended business there almost daily and had investments largely in its bonds and bonds of its municipalities, declared in his will and in innumerable other documents that he was a resident of New York, and in general unquestionably desired to be and, relying upon the legal advice of his counsel, believed that he was, legally domiciled in New York. Nevertheless, the Court of Appeals held that the decedent at the time of his death was domiciled in Connecticut.

In the court below, appellees claimed to "have reduced to a few simple rules," the principles followed by this Court in **Shelton v. Tiffin**, 6 How. 163 (1848), **Ennis v. Smith**, 14 How. 400 (1852), **Jones v. League**, 59 U. S. 76 (1855), **Pennsylvania v. Ravenel**, 62 U. S. 103 (1858), **Mitchell v. United States**, 88 U. S. 350 (1874), **Desmare v. United States**, 93 U. S. 605 (1877), **Chicago & N. W. R. Co. v. Ohle**, 117 U. S. 123 (1886), **Morris v. Gilmer**, 129 U. S. 315 (1889), **Penfield v. Chesapeake, O. & S. W. R. Co.**, 134 U. S. 351 (1890), **Anderson v. Watt**, 138 U. S. 694 (1891), **Sun P. &**

P. Ass'n. v. Edwards, 194 U. S. 377 (1904), **Williamson v. Osenton**, 232 U. S. 619 (1914) and **Gilbert v. David**, 235 U. S. 561 (1915).

The rules were stated to be:

"1. A residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time.

"2. A domicile once obtained, remains until another is acquired.

"3. A change of domicile requires the actual removal from the former domicile and an intention to abandon the old domicile.

"4. A person may have more than one residence but he cannot have more than one domicile.

"5. If a person has two or more residences at different times of the year, that will be esteemed his domicile which he himself selects, or describes or deems to be his home, and where he votes or exercises the duties of a citizen.

"6. A person is at liberty to choose his domicile, and his motive is unimportant if he acts in good faith.

"7. The burden of proof of change of domicile rests upon him who alleges such change."

The first, second, and fourth of these rules may be accepted as correct. The seventh clearly has no place upon a motion for preliminary injunction. The third, fifth and sixth points state rules of law supported by no Federal case we know; and they are certainly not recognized by this Court today.

We have found no case decided by this Court which supports a rule that a change of domicile requires "an

intention to **abandon** the old domicile." And certainly the Restatement contains no such rule. The intention required is an intention to remain permanently or for an indefinite period of time at the new abode, **Ennis v. Smith**, 14 How. 400, 423 (1852); **Mitchell v. United States**, 21 Wall. 350, 352 (1874); and **Sun Printing & Publishing Ass'n v. Edwards**, 194 U. S. 377, 383 (1904); or differently stated, the absence of any present intention not to reside there permanently or indefinitely, **Morris v. Gilmer**, 129 U. S. 315, 328 (1889); **Williamson v. Osenton**, 232 U. S. 619, 624, 625 (1914); and **Gilbert v. David**, 235 U. S. 561, 569 (1915).

And certainly no Federal decision has held that in any case in which "a person has two or more residences at different times of the year, that will be esteemed his domicile which he himself selects, or describes or deems to be his home, and where he votes or exercises the duties of a citizen." If that were so, every person occupying a home at a seashore resort for a month or two during the summer season could by the simple expedient of declaring that to be his home and voting there, render it his domicile.

An equally absurd result would be obtained by adherence to the rule that "A person is at liberty to choose his domicile." A mere statement of choice would then be conclusive.

It is quite clear that the cases now to be discussed, cannot in any way be regarded as supporting rules 3, 5, or 6 as formulated by appellees.

In **Shelton v. Tiffin**, 6 How. 163 (1848), the defendant contended that he was a citizen of Virginia and not of Louisiana. For two years he and his wife had been living on and cultivating a plantation in Louisiana. They had built a more comfortable home upon it and had absented

themselves only once for a short period to go to Mississippi. The case does not state that the defendant even retained a purported home in Virginia, but merely refers to a statement to a witness to the effect that he sometimes spoke of returning to that state. Of course the Court, without extended discussion, held that the defendant was domiciled in Louisiana. In the court below, appellees taking advantage of an apparent misprint, quote with other portions of the opinion, the following statement:

> "An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient."

Obviously, the Court meant to say:

> "An exercise of the right of suffrage is **not** conclusive . . ."

As a matter of fact, the defendant had never voted in Louisiana. Yet the Court held he was domiciled there.

In **Ennis v. Smith**, *supra*, the Court said at page 423:

> " . . . there must be to constitute it (a domicile of choice) actual residence in the place, with the intention that it is to be a principal and permanent residence."

Appellees' attempt to interpret the case as placing especial importance upon oral declarations is unsound. There was no evidence whatever of a domicile elsewhere. Thus, at page 423 the Court said:

> " . . . There is nothing in the record disproving his domicil in France, and we must, from his own declarations and other proofs in the record, receive it as a fact that he was domiciled there at the time."

In **Mitchell v. United States**, *supra*, this Court said that a change of domicile is effected when there is

> "A residence at a particular place with . . . an intention to remain there for an unlimited time."

The requisite intention is not an intention to abandon the former domicile, as defendants contend.

In **Chicago & Northwestern Ry. Co. v. Ohle**, 117 U. S. 123 (1886), the Court approved a particular portion of the charge of the lower court to the effect that if the plaintiff went to Illinois with the intention of remaining and acquiring citizenship there, he became a citizen of Illinois and could institute suit in the Federal courts. The jury found that a change of citizenship had been effected.

In **Morris v. Gilmer**, *supra*, at page 328, the language of the Court is decisive as to the intention required to effect a change of domicile. It is as follows:

> "He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating jurisdiction of the Federal court . . . He was, therefore a mere sojourner in the former State . . . "

In **Sun Printing & Publishing Assn. v. Edwards**, *supra*, the Court said at page 383:

> "Now, it is elementary that, to effect a change of one's legal domicil, two things are indispensable; first, residence in a new domicil; and, second, the intention to remain there."

In the leading case of **Williamson v. Osenton**, *supra*, the Circuit Court of Appeals certified to this Court the ques-

tion of the domicile of the plaintiff who had gone to Virginia "with the intention of making her home in that State for an indefinite time in order that she might institute this suit." The Court held that the plaintiff's domicile had shifted to Virginia.

We have fully discussed and quoted from **Gilbert v. David**, *supra*. It is the most recent, and now the leading, pronouncement of this Court on the rules governing change of domicile.

Jones v. League, *supra*, is utterly irrelevant. The decision turns upon whether a conveyance of title by an owner of a tract of land was bona fide so that the resulting suit in the Federal court by the transferee, as a citizen of another State, was allowable. The Court found that the transfer had not been bona fide since the suit was actually for the original owner's benefit and therefore held there was no diversity of citizenship. The words "domicile" or "residence" are nowhere mentioned in the opinion, and the only possible connection with our discussion is a dictum to the effect that to accomplish a change of citizenship, a bona fide intention to become a citizen of the State to which a person removes is necessary.

In **Pennsylvania v. Ravenel**, *supra*, the sole question before the Court was whether in its charge to the jury the court below had taken the determination of the facts of domicile from the jury. This Court held it had not. The Court did not pass on the statement of the law of domicile by the lower court or itself say anything upon the subject. It is incorrect to say, as appellees did, in the court below, that the Court held that there was nothing in the lower court's charge which was objectionable. At page 110, this Court said:

"The court then stated to the jury the principles of law applicable to the question of domicil, **to which no exception has been taken.**"

Desmare v. United States, *supra,* merely holds that since there was no proof whatever of a change of domicile, Desmare's former domicile continued. Of course, since he was asserting a change of domicile without any proof whatever of change of residence, the burden of proving a change of domicile was upon him.

In **Penfield v. Chesapeake & S. W. Ry. Co.,** *supra,* the sole question was whether plaintiff was a "resident" of New York state within the meaning of that word as used in a statute of limitations. At page 359, the Court said:

> "Assuming, without deciding, that the testimony introduced for the plaintiff in the present case would warrant the impression that he had obtained a domicil in the state of New York . . ., there is nothing in the evidence which had the slightest tendency to show that his own actual residence was in the state of New York . . . ."

It is apparent, therefore, that that case cannot be cited as authority in this proceeding.

In **Anderson v. Watt,** *supra,* the Court held that a wife's domicile is that of her husband. It was not disputed that defendant's husband was domiciled in New York and the Court therefore held that defendant (his wife) was also domiciled there. The case has no other significance.

In the court below, appellees also referred to **The Venus, Rae, Master,** 8 Cranch 253 (1814).

This is a very early case growing out of the War of 1812. The question was whether the owner of a seized

vessel was domiciled in England. The Court stated the rules governing change of domicile followed by the later cases. At page 29, Justice Washington said:

> "If it sufficiently appear, that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days."

In certain types of case, it has been held that the law of domicile is determined by the law of the forum. Thus in cases of divorce or of probate of wills this principle has been followed. But it has never been the rule in determining the jurisdiction of Federal courts or in enforcing rights arising under the Constitution or laws of the United States. Thus of the cases we have discussed on domicile, not one resorts to the decisions of the courts of either of the two states involved to arrive at the law of domicile.

To hold that in cases like the present the law of domicile is determined by the law of the forum would be to render meaningless the recent decisions of this Court in **Farmers Loan & Trust Co. v. Minnesota**, 280 U. S. 204 (1930), **First National Bank of Boston v. Maine**, 284 U. S. 312 (1932), holding that only the state of domicile may levy inheritance tax upon the intangible personal property of a decedent. If the law of domicile were held to be the law of the forum, the number of states which could tax the intangible personalty of a decedent would be the number whose laws of domicile enabled or compelled its courts to hold that decedent had been domiciled there at the date of his death. This would render inevitable the very result which the recent decisions were intended to render impossible and which they have held to be unconstitutional.

The real question involved in the present case is the situs of property for inheritance taxation. This Court is now unequivocally committed to the proposition that only one state may levy inheritance tax against any kind of property, tangible or intangible. That state is the state of the situs of the property.

In the case of situs of tangible personal property for inheritance tax purposes, the determination of the question depends upon the location of the property; and the courts have never held that this is determined by the law of the forum. (See **City Bank Farmers Trust Co. v. Schnader**, 293 U. S. 112 (1934)).

In the case of situs of intangible personal property for inheritance tax purposes, the determination of the question depends upon the domicile of the owner at the time of his death. It would be just as impossible to hold that this is determined by the law of the forum.

The law to be applied is the general law of domicile as stated by this Court. Certainly the determination of situs for taxation in cases arising under the Constitution of the United States calls for the application of Federal rules.

The Law Applied to the Facts.

Under the rules of domicile enunciated again and again by this Court, it cannot be doubted, upon a proper consideration of the facts stated in our injunction and reply affidavits, that Dr. John T. Dorrance at the date of his death was domiciled in Pennsylvania. The rules stated in the **Restatement of the Law of Conflict of Laws** reinforce this conclusion.

It certainly cannot be seriously argued that these facts do not make out a *prima facie* case of domicile in Penn-

sylvania, for purposes of a motion for preliminary injunction.

We respectfully refer the Court to pages 7 to 16 of this brief.

Appellees, however, apparently intend to argue that an injunction should not be granted because, they say, the individual executors,—Mrs. Dorrance, George Morris Dorrance, M. D., and Arthur C. Dorrance,—testified in Pennsylvania, to certain facts which they were then advised, established Dr. Dorrance's domicile at the time of his death, in New Jersey.

We submit that the present cases are not appeals on the merits, and that the testimony in the Pennsylvania case is not properly a part of this record.

But if we are mistaken, and this Court should regard as relevant here, an analysis of the Pennsylvania testimony, we shall have no difficulty in showing that none of the facts to which the executors testified, were substantially at variance with the facts pleaded in the bills of complaint in the court below, and contained in the plaintiffs' injunction and reply affidavits.

VII.

APPELLANTS ARE NOT ESTOPPED TO MAINTAIN THEIR ACTIONS IN THE COURT BELOW.

In the Court below appellees argued that the appellant, Mrs. Hill, is estopped to bring this suit because she accepted her legacy under her father's will.

Therefore, appellees say, Mrs. Hill cannot question their right to collect inheritance tax from her.

And as to the executors, the appellees argue that they also are estopped because they probated decedent's will in

New Jersey and resisted the efforts of Pennsylvania to collect inheritance tax from them.

We respectfully submit that neither the appellant, Mrs. Hill, nor the executors-appellant, are debarred by any estoppel from maintaining their respective actions in the Court below.

Neither the appellees nor the State of New Jersey gave Mrs. Hill her legacy. She did not accept it from them.

And the decedent did not by his will require his legatees to submit to double transfer inheritance taxation. Thus Mrs. Hill is not violating, or attempting to set aside, any provision of the will under which she has taken her legacy.

By accepting her legacy under the will, Mrs. Hill has been receiving and will receive less than the share of the estate to which she would be entitled under the intestate laws either of New Jersey or of Pennsylvania.

As far as the executors are concerned, the situation is much the same.

The executors are merely fiduciaries. They are not dealing with their own property. Surely any acts of theirs could not be held to penalize the interests of beneficiaries as yet unborn, even if the living beneficiaries who are *sui juris*, and the guardians of those who are minors, might, by some perversion of justice, be penalized.

After all, what have the executors done which should estop them from resisting double transfer inheritance taxation? Let us see.

The will required them to offer it for probate in New Jersey. They did so.

Pennsylvania claimed transfer inheritance tax. The executors knew that the decedent desired himself to be regarded as domiciled in New Jersey, and wished his estate administered there. Accordingly, they bitterly contested Pennsylvania's claim. But Pennsylvania's claim was sustained.

Pennsylvania moved to collect the tax before any step was taken by the taxing officers of New Jersey.

When the New Jersey taxing officers did assess the estate, the executors **because of the pendency of the Pennsylvania claim,** requested that the assessment be opened. The New Jersey authorities acquiesced, and co-operated with the executors in fighting Pennsylvania. This was disclosed by counsel for the defendants at the oral argument in the court below. He stated that he had conferred many times with counsel for the executors regarding the Pennsylvania litigation.

It was only after the Supreme Court of Pennsylvania had held that Dr. Dorrance was domiciled in that State, that the executors asserted in the New Jersey proceedings that the decedent was not domiciled in the latter State.

As fiduciaries they could not escape this change of position. They could not submit to double taxation without subjecting themselves to a claim for surcharge in the amount of the second tax paid.

We submit that there is nothing in this situation which estops the executors in any court to assert that their decedent was domiciled in a State, the highest court of which has held him to have been a resident of that State at the time of his death.

If Dr. Dorrance was domiciled in Pennsylvania at the time of his death, the New Jersey authorities do not have

jurisdiction over his intangible personal property for the purposes of inheritance taxation. It follows that every step which they have taken in assessing that property for taxation is void. They cannot acquire jurisdiction by consent and, *a fortiori*, they cannot acquire it by estoppel. This proposition is fully established by many decisions of the courts of New Jersey.

In **Dixon v. Russell**, 78 N. J. L. 296 (1909) a case involving the assessment of inheritance tax, Judge Minturn speaking for the Supreme Court of New Jersey said at page 299:

> ". . . The jurisdiction of the surrogate, however, to assess the tax must be established by more than a mere estoppel *in pais*, arising as is claimed by the learned attorney-general from the fact that the prosecutor *pro forma* requested that the assessment be levied as the basis for invoking this writ, because manifestly this statutory proceeding does not establish a tribunal of which it can be said that consent can confer jurisdiction. That principle can be invoked only where the tribunal whose jurisdiction is in question has general power to hear the controversy, and is not applicable where the jurisdiction or power is not authorized by law, or conferred upon it by the constitution. 11 Cyc. 673 and cases cited; Cooley Const. Lim. 398."

There can be no doubt that this is settled law in New Jersey:

In re Chadwick's Will, 80 N. J. Eq. 168 (1920); **Kaufman v. Smathers**, 111 N. J. L. 52 (1933); **Van Ommen v. Hogeman**, 100 N. J. L. 224 (1924); **State v Baker**, 102 N. J. L. 349 (1926); **Lazorchak v. Demarest**, 108 N. J. L. 198 (1931); **Trustees of School District No. 28 v. Eliza Stocker**, 42 N. J. L. 115 (1879); **Collins v. Keller**, 57 N. J. L. 429, Atl. 753 (1896).

Mrs. Hill is not seeking to break her father's will nor are the executors engaged in such an undertaking. They are seeking to avoid the imposition of an unconstitutional tax. There is no case which we have been able to find anywhere which holds that a legatee must submit to an illegal tax merely because the testator misapprehended the place of his domicile, and because after his death his executors undertook to sustain the testator's mistaken belief.

The inapplicability of appellees' contention that the executors are estopped in this proceeding because of the probate of decedent's will is made clear by the case of **In re Mesa's Estate** already discussed in reply to the contention that the decree of probate is res judicata. See page 81.

The situation in this case is not unlike that which has arisen from time to time in patent cases, when it is claimed that a litigant had taken inconsistent positions.

In **Haughey v. Lee**, 151 U. S. 282 (1894), Mr. Justice Shiras said, at page 285:

> "... Whether or not there is any inconsistency in trying, at one time, to get a patent for a supposed invention, and in afterwards alleging, as against a rival successful in obtaining a patent, that there is no novelty in the invention, it certainly cannot be said to constitute an estoppel...."

The court continued:

> "... Besides, the defence of want of patentable invention in a patent operates not merely to exonerate the defendant, but to relieve the public from an asserted monopoly, and the court cannot be prevented from so declaring by the fact that the defendant had ineffectually sought to secure the monopoly for himself."

Haughey v. Lee was expressly reaffirmed by the United States Supreme Court in **Paramount Publix Corporation v. American Tri-Ergon Corporation**, 294 U. S. 464 (1935).

Whether one state or another is entitled to transfer inheritance tax, like a question of right to a patent, is not a mere private controversy. The states have rights. Two of them cannot collect the tax on the same property. Which of them is really entitled to the tax is a matter which cannot be determined by estoppels born of the conduct of executors. It is a substantive question of law and of fact which the executors are duty bound to have decided, however inconsistent their positions may have been at different times.

In **Grubb v. Public Utilities Commission**, 281 U. S. 470 (1930) at p. 475, Mr. Justice Van Devanter said:

> "* * * That the state court had jurisdiction of the parties is plain and not questioned But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for **jurisdiction of the subject matter must arise by law and not by mere consent** . . . "

This aptly covers the present situation.

VIII.

APPELLANTS WERE NOT GUILTY OF LACHES.

In the court below, appellees' counsel asserted, dogmatically, that appellants had been guilty of laches, "and for this reason alone, the motion for interlocutory injunction should be denied".

Not a case was cited to sustain this contention.

Not only are there no cases to sustain the appellees' pronouncement; there are likewise no facts.

Clearly the present actions could not be brought before the State's administrative officer took or threatened to take the first step looking towards the collection of a tax from the estate.

The assessment was made by the State Tax Commissioner on October 10, 1932.

A bill in equity cannot be filed until the administrative procedure has been completed. See ante, page 43.

Until appellees' brief in the court below was filed, the Attorney General of New Jersey was of the opinion that the Ordinary's review of the Tax Commissioner's action was "purely administrative, and not judicial". See page 57.

If the Attorney General of New Jersey was laboring under this impression until April, 1935, the appellants cannot be convicted of laches at his behest, for having entertained the same view.

The Ordinary's decision was rendered on May 11, 1934, —10½ months prior to the filing of the bills of complaint in these cases.

Every argument advanced by the Attorney General of New Jersey to demonstrate in the **Nevin Case**, that the Ordinary's review is "purely administrative and not judicial", applies with even greater force to sustain our position that the review of the Ordinary's action by the Supreme Court of New Jersey is also administrative.

The Supreme Court of New Jersey dismissed the writ of certiorari on February 11, 1935.

The bills were filed less than 2 months later, and more than 10 months prior to the expiration of the period allowed to the executors by law, for taking an appeal to the New Jersey Court of Errors and Appeals.

In **Hansen v. Slick**, 216 Fed. 164 (1914) at p. 172, Judge Orr, of the Western District of Pennsylvania, said:

> "Laches has been defined to be such neglect or omission to assert a right as, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar."

In **London & San Francisco Bank v. Dexter Horton & Co.**, 126 Fed. 593 (C. C. A. 9th, 1903, certiorari denied, 194 U. S. 631) Judge Morrow said, at p. 601:

> "One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that, by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of the plaintiff to be enforced."

See also **McIntire v. Pryor**, 173 U. S. 38 (1899); **U. S. Casualty Co. v. Charleston, S. C., Mining & Mfg Co.**, 183 Fed. 238 (1910), 247; **Hanchett v. Blair**, 100 Fed. 817 (C. C. A. 9th, 1900), 824.

In the present case, the appellees have certainly not been prejudiced by any delay which there may have been in bringing these suits.

If appellees are not entitled to collect inheritance tax from the Dorrance estate, no amount of delay can prejudice them.

If they are entitled to the tax, the estate will be called upon to pay interest at the rate of not less than 6 per cent. per annum, which will more than compensate for the delay.

Thus, even had there been unwarrantable delay in instituting this action,—which we deny,—it did not prejudice the appellees, and affords no foundation for a charge of laches.

IX.

APPELLANT MRS. HILL'S RIGHT TO SUE.

It is doubtful whether any case just like this has ever arisen, as far as concerns the right of the appellant, Mrs. Hill, as legatee, to sue on her own behalf.

In any event, we have been unable to find any cases which rule the question here presented.

The executors of Dr. Dorrance have asked to have the probate of his will and their appointment revoked on the ground that the decedent was domiciled in Pennsylvania.

Their petition for that purpose is now pending before the Surrogate of Burlington County. Should it be granted, their appointment would be void *ab initio*. Necessarily their status in any pending litigation would be subject to attack by the adverse parties. And, as proceedings in New Jersey, attacking inheritance tax assessments made by the State Tax Commissioner are statutory and must be taken within the times prescribed by statute, the avoidance of the executors' appointment, might most seriously imperil Mrs. Hill's rights.

But there is an even more serious situation confronting Mrs. Hill.

Not only have the executors formally questioned their own authority, but the appellee Martin, State Tax Com-

missioner of New Jersey, has filed a petition in the Orphans Court of Burlington County, New Jersey, praying the court to remove the executors because of an alleged breach of duty in asking to have the probate and the granting of letters testamentary revoked.

The purpose of this proceeding is amazingly transparent. The State Tax Commissioner has asked the court to substitute for the present executors, the State Treasurer of New Jersey.

Obviously were the State Treasurer to become the executor of the will of Dr. Dorrance, all proceedings challenging the validity of the New Jersey inheritance tax assessment would promptly come to an end. At that point, the only possible recourse of Mrs. Hill would be to institute proceedings in her own name.

But independent action deferred until that date might well be too late. It might then be impossible for Mrs. Hill to take proceedings necessary for the protection of her own interests.

The Orphans Court of Burlington County has not acted on the petition of the State Tax Commissioner. The petition ought to have been dismissed promptly, but although it was filed on May 12, 1933, it is still threateningly menacing the rights of the legatees under Dr. Dorrance's will.

Under these circumstances, we submit that Mrs. Hill has a right in her own name to seek to prevent her property being taken without due process of law.

The bill amply sets forth the loss which Mrs. Hill will suffer if the New Jersey tax assessment is sustained. There is a specific assessment against her life interest in the amount of $1,566,925.01. In addition, for years to come,

Mrs. Hill's annual income will be substantially reduced if the claim of the appellees to inheritance tax should be sustained. She expressly alleges that her loss will exceed $3,000,—the jurisdictional amount.

X.

CONCLUSION.

For the reasons stated in this brief, we believe that the decrees of the court below should be reversed.

Respectfully submitted,

WM. A. SCHNADER,
JOHN MILTON,
Attorneys for Appellants.

APPENDIX A.

I. PARTS OF NEW JERSEY TRANSFER INHERITANCE TAX ACT.

Chapter 228, Laws of 1909, as amended: by Chapter 226, Laws of 1912; Chapter 57, Laws of 1914; Chapter 151, Laws of 1914; Chapter 213, Laws of 1916; Chapter 283, Laws of 1918; Chapter 174, Laws of 1922; Chapter 294, Laws of 1926; Chapter 228, Laws of 1927; Chapter 144, Laws of 1929; Chapter 303, Laws of 1931.

An Act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars ($500) or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases:

First. When the transfer is by will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.

Second. When the transfer is by will or intestate laws of real property within this State or of goods, wares and

merchandise within this State, and the decedent was a nonresident of the State at the time of his death.

Third. When the transfer is of property made by a resident, or is of real property within this State, or of goods, wares and merchandise within this State, made by a nonresident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

Fourth. When any person or corporation comes into the possession or enjoyment, by a transfer from a resident or from a nonresident decedent, when such nonresident decedent's property consists of real property within this State or of goods, wares and merchandise within this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by an instrument taking effect after the passage of this act, or of any property transferred pursuant to a power of appointment contained in any instrument taking effect after the passage of this act.

Fifth. Whenever property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the

surviving joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been devised or bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such part thereof as may be proved to the satisfaction of the State Tax Commissioner by the surviving joint tenant or joint tenants, person or persons, to have originally belonged to him or them and never to have belonged to the decedent; *provided, however,* that in case of a nonresident decedent this paragraph shall apply only to real property within this State or goods, wares and merchandise within this State.

All taxes imposed by this act shall be at the respective rates hereinafter specified upon the clear market value of such property to be paid to the State Tax Commissioner and deposited with the Treasurer of the State, when and as collected, for the use of said State, and all administrators, executors, trustees, grantees, donees or vendees, shall be personally liable for any and all such taxes until the same shall have been paid as hereinafter directed, for which an action of debt shall lie in the name of the State of New Jersey. In determining the clear market value of such property the following deductions and no others shall be allowed: Debts of the decedent owing at the date of death; *provided, however,* that in the case of a resident decedent there shall not be allowed a debt of said resident decedent owing for or secured by property outside of this State except when the

property for which the debt is owing or for which it is secured is subject to the tax imposed by this act, or except when the foreign debt exceeds the value of the property securing it or for which it was contracted, when the excess may be deducted, a reasonable sum for funeral expenses and last illness, such proportion of the State, county and municipal taxes for the current fiscal year upon the property as the elapsed portion of the said year bears to full calendar year, the ordinary expenses of administration, including the ordinary fees allowed executors and administrators and the ordinary fees of their attorneys, and transfer taxes paid or payable to other States or Territories or the District of Columbia or foreign governments on any property the transfer of which is taxable hereunder. *Provided, further, however,* the amount due or paid the government of the United States as a Federal estate tax shall not be considered as an expense of administration and shall not be allowed as a deduction.

(Here follow exemptions and rates.)

2. When any person shall bequeath or devise, convey, sell, grant or give any property or interest therein, or income therefrom, to any person or corporation for life or for a term of years, and vested interest in the remainder or corpus of said property to any person, or to any body politic or corporation, the whole of said property so transferred as aforesaid, shall be appraised immediately at its clear market value; and the value of said life estate or estate for a term of years shall be fixed in the manner hereinafter provided by section fourteen of this act; and the value of the remainder in said property so limited shall be ascertained by deducting the value of the said life estate or estate

for a term of years from the appraised market value of the property so limited; and the tax on the said estate or estates, remainder or remainders, interest or interests, shall be immediately due and payable and remain a lien upon the entire property so limited until paid.

3. Where an instrument creates an executory devise, or an estate in expectancy of any kind or character which is contingent or defeasible, the property transferred in accordance with such executory devise, or the property in which such contingent or defeasible interest is created by any such instrument, shall be appraised immediately at its clear market value, and after deducting from such appraisement the value of the life estate, or estate for a term of years, created by such instrument, the tax on such life estate, or estate for a term of years, if taxable under this act, shall be immediately levied and assessed, but the tax on the balance of said appraised value of such estate shall not be levied or assessed until the person or corporation entitled to said property comes into the beneficial enjoyment, seizin or possession thereof, and if taxable shall then be taxed. Where an instrument creates a power of appointment, the life estate, or estate for a term of years, created and transferred by such instrument, if taxable, shall be immediately appraised and taxed at its clear market value, but the appraisal and taxation of the interest or interests in remainder to be disposed of by the donee of power shall be suspended until the exercise of the power of appointment, and shall then be taxed, if taxable, at the clear market value of such property, which value of such property shall be determined as of the date of the death of the creator of the power.

A tax on an estate for life, or on an estate for a term of years, levied and assessed as directed in this section,

shall be due and payable as provided in section five of this act. All other taxes levied and assessed as directed in this section and all taxes on any property which may be transferred to the residuary legatees, heir or next of kin of any decedent, or which may revert to the heir of any decedent by reason of the failure of any contingency upon which any remainder may be limited, shall be due and payable within two months after the person entitled to the property shall come into the enjoyment, seizin or possession thereof, and if not paid shall thenceforth bear interest at the rate of ten per centum per annum until paid. No executor or trustee shall turn over any property of an estate mentioned in this section until the tax due thereon, and interest, if any, shall have been paid to the State Tax Commissioner, and any executor or trustee who shall turn over any property prior to the payment of the tax due thereon, together with interest, shall be personally liable for such tax and interest, which said liability may be enforced by an action of debt in the name of the State of New Jersey.

The State Tax Commissioner is hereby empowered and authorized to enter into an agreement with the executors or trustees of any estate in which remainders or expectant estates have been of such a nature, or so disposed and circumstanced that the taxes therein were held not presently payable, or where the interest of the legatees or devisees were not ascertainable at the death of the testator, grantor, donor or vendor, and to compound such taxes upon such terms as may be deemed equitable and expedient; and to grant discharge to said executors and trustees upon the payment of the taxes provided for in such composition; *provided, however,* that no such composition shall be conclusive in favor of said executors or trustees as against the interests of such cestuis que trust as may possess either pres-

ent rights of enjoyment or fixed, absolute or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally, when competent, or by guardian or committee.

Provided, further, however, that if the executor, trustee or the person or persons, or body politic or corporate, beneficially interested in the property chargeable with the tax shall elect to defer the adjustment of the taxes until the said person or persons, or body politic or corporate, shall come into actual possession or enjoyment of the said property, such person or persons, or body politic or corporate, or the executor or trustee, shall execute a bond to the State of New Jersey, in a penalty of twice the amount of the tax imposed at the highest possible rate, with such surety or sureties as the State Tax Commissioner shall approve, conditioned for the payment of the said tax and interest thereon at such time or period as hereinabove provided, which bond shall be filed in the office of the State Tax Commissioner. Upon the filing and approval of said bond, the State Tax Commissioner shall be authorized to issue consents permitting the transfer of any and all property disclosed in the proceeding.

(Section 4 deals with tax on bequest to executors in excess of a reasonable compensation.)

5. All taxes imposed by this act shall be due and payable at the death of the testator, intestate, grantor, donor or vendor, unless in this act otherwise provided, and if not paid within one year from the date of the death of the testator, intestate, grantor, donor or vendor, such tax shall bear interest at the rate of ten per centum per annum, to

be computed from the expiration of one year from the date of the death of such testator, intestate, grantor, donor or vendor, or until the same is paid, and in all cases where the executors, administrators, grantees, donees, vendees, or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond to the State of New Jersey in double the amount of the tax, conditioned to pay said tax, and any interest which may fall due thereon, said bond to be approved as to the form and sufficiency thereof by the State Tax Commissioner.

All taxes levied and assessed under this act shall be and remain a lien on all property owned by the decedent as of the date of death until paid or secured by bond, as provided for in the several provisions of this act.

6. The penalty of ten per centum per annum imposed by section five hereof for the nonpayment of said tax shall not be charged where in cases by reason of claims made upon the estate necessary litigation or other unavoidable cause of delay the estate of any decedent, or a part thereof, cannot be settled at the end of a year from the death of the decedent, and in such cases only six per centum per annum shall be charged upon the said tax from the expiration of such year until the cause of such delay is removed.

(Section 7 deals with deduction of tax before delivering bequests to legatees.

Section 8 deals with the executors' power to sell property to meet the tax.)

9. Any sum of money retained by any executor, administrator or trustee, or paid into his hands for any tax due under this act, shall be paid by him, within thirty days

thereafter, to the State Tax Commissioner, and the person so paying shall be entitled to receive a receipt signed by the Treasurer of this State and countersigned by the State Tax Commissioner thereof, for such payment, which receipt shall be a proper voucher in the settlement of the account of any such executor, administrator or trustee.

Whenever the tax and interest chargeable has been paid in full or secured by bond, as is provided for in the several provisions of this act, or whenever any estate is determined by the State Tax Commissioner to be exempt from the payment of any inheritance tax to the State of New Jersey, there shall be issued to the executor, administrator or other proper representati[illegible] of the estate, a statement of the fact in such form as may be adopted by the State Tax Commissioner, which statement shall include a concise but definite description of the real property disclosed in the proceeding and shall be signed by the State Tax Commissioner. Such statement may also be recorded in the clerk's office of the county in which said real property is situated, in the book which shall be kept by the clerk for such purpose, labeled "Inheritance Tax," for which recording and indexing the said clerk shall receive a fee at the same rates as those charged for recording deeds, mortgages, bills of sale, chattel mortgages and all other documents.

10. Whenever any of the real estate of which any decedent may die seized shall pass to any body politic or corporate, or to any devisee or beneficiary other than the corporations, institutions and organizations specifically exempted under the provisions of this act from the tax imposed hereby, it shall be the duty of the heirs, devisees, executors, administrators or trustees of such decedent to

give information thereof in writing to the State Tax Commissioner within six months after they obtain title thereto or undertake the execution of their respective duties, or, if the fact be not known to them within that period, then within one month after the same shall have come to their knowledge.

(Section 11 relates to refunds in case of debts proven after the payment of the tax.)

12. If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this State standing in the name of a decedent, or standing in the joint names of such a decedent and one or more persons, or in trust for a decedent, liable to any such tax, the tax shall be paid to the State Tax Commissioner on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control, securities, deposits or other assets belonging to or standing in the name of a decedent who was a resident, or belonging to or standing in the joint names of such a resident decedent and one or more persons, including the shares of the capital stock of, or other interests in, safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the State Tax Commissioner at least ten days prior to said delivery or transfer; nor shall any such deposit company, trust company, corporation, bank or other institution, per-

son or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a resident decedent, or belonging to or standing in the joint names of a resident decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, shares of stock, or other assets, including the shares of capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution, making the delivery or transfer under the provisions of this act, unless the State Tax Commissioner consents thereto in writing. And it shall be lawful for the said State Tax Commissioner, either personally or by representative, to examine said securities, deposits or assets of a resident decedent, at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination, or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits, shares of stock, or other assets, including the shares of capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto a penalty of one thousand dollars; which liability for such tax and interest, or the penalty above described, or both, shall be enforced in an action of debt in the name of the State of

New Jersey, and the same, when recovered, shall be paid into the treasury of the State of New Jersey for the use of the State; *provided*, there shall be no liability for the payment of such tax and interest, or for such penalty of one thousand dollars in any case where such safe deposit company, trust company, corporation, bank or other institution, person or persons shall make delivery of securities, deposits, shares of stock or other assets, including the shares of capital stock of, or other interest in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, belonging to or standing in the names of two or more persons, without knowledge or reasonable ground to believe, that one of the persons to whom such securities, deposits or other assets belong or in whose name they stand is dead.

No corporation of this State shall transfer any stock of said corporation standing in the name of or belonging to a decedent, resident or nonresident, or in the joint names of a decedent and one or more persons, or in trust for a decedent, unless notice of the time of such intended transfer be served upon the State Tax Commissioner at least ten days prior to such transfer, nor until said Commissioner shall consent thereto in writing. Any corporation making such a transfer without first obtaining the consent of the State Tax Commissioner as aforesaid shall be liable for the amount of any tax which may thereafter be assessed on account of the transfer of such stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars, which liability for such tax and interest and the said penalty prescribed may be enforced in an action of debt in the name of the State of New Jersey, said penalty, when recovered, to be paid into the treasury of the State of New Jersey.

Nothing in this section contained shall apply to the assignment or transfer of any stock or obligations of corporations of this State or of national banking associations located in this State standing in the name of or belonging to a nonresident decedent who dies on or after July first, one thousand nine hundred and twenty-six, or standing in the joint names of such a nonresident decedent and one or more persons, or in trust for such a nonresident decedent, and nothing in this section contained shall require notice of any such intended transfer of any such stock or obligations to be served upon the State Tax Commissioner or shall require the consent in writing of said Commissioner thereto.

A tax shall be assessed on the transfer of property made subject to tax as aforesaid in this State of a nonresident decedent if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this act if such nonresident decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated; *provided,* that nothing in this clause contained shall apply to any specific bequest or devise of any property in this State.

(Section 13 authorizes the State Tax Commissioner to make certain investigations.

Section 14 provides how the value of life estates, etc., shall be determined.)

15. When any amount of said tax shall have been paid erroneously to the State Tax Commissioner, it shall be

lawful for the Comptroller of the Treasury on satisfactory proof rendered to State Tax Commissioner of such erroneous payments, and duly certified by him to the comptroller, to draw his warrant on the State Treasurer, in favor of the executor, administrator, person or persons who have paid any such tax in error, or who may be lawfully entitled to receive the same, for the amount of such tax so paid in error; *provided,* that all such applications for the repayment of such tax shall be made within two years from the date of such payment.

16. The register of the Prerogative Court and every surrogate of any county in this State shall, within ten days after the probate of any will, either foreign or domestic, or the filing of a copy of any foreign will, or the taking out of letters of administration, notify, in writing, the State Tax Commissioner of such probate or administration; and any surrogate or the register of the Prerogative Court failing to notify said Commissioner in writing of the probate of any will, or the filing of a copy of any foreign will, or the taking out of any letters of administration, shall be liable to a penalty of two hundred dollars, to be recovered in an action of debt in the name of the State of New Jersey.

17. The State Tax Commissioner, either personally or by his assistant or other employee, is hereby empowered to examine any and all papers, documents and files which now are or hereafter may be filed or lodged with the register of the Prerogative Court, or with the surrogate of any county or with any other official of this State or of any municipality thereof, or with any person or corporation, for the purpose of ascertaining what, if any, property is, or shall be, liable to the payment of the tax provided for by this act.

18. In order to fix the value of property of persons whose estates shall be liable to the payment of a tax under this act, whether the same be in the ownership of a resident or nonresident decedent, the State Tax Commissioner on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as and whenever occasion may require. Every such appraiser shall forthwith give notice, by mail, to such persons as the State Tax Commissioner shall direct, of the time and place when and where he will appraise such property. He shall at such time and place appraise the same at its fair market value, and for that purpose the said appraiser is authorized to issue subpœnas and to compel the attendance of witnesses, and to take the evidence of such witnesses under oath concerning such property and the value thereof, and he shall make report thereof, and of such value, in writing to said State Tax Commissioner, together with such other facts in relation thereto as the said State Tax Commissioner may, by order, require, which report and other data required by said Commissioner shall be filed in the office of such Commissioner, and from said report the said State Tax Commissioner shall forthwith assess and fix the cash value of such estate and levy the tax to which the same is liable, and shall immediately give notice thereof, by mail, to all parties known by said State Tax Commissioner to be interested therein. Any person or corporation dissatisfied with said appraisement or assessment may appeal therefrom to the Ordinary of this State within sixty days after the making and filing of such assessment, on giving a bond, approved by the Ordinary of this State, conditioned to pay said tax so as aforesaid levied by the said State Tax Commissioner, together with interests and costs, if the said tax be affirmed by the Or-

dinary. Any person failing to attend before an appraiser after service of a subpœna, or refusing to give evidence concerning any estate, shall be liable to a penalty of two hundred dollars, to be recovered in an action of debt by the State Tax Commissioner.

(Section 19 provides a penalty for misconduct by appraisers.)

20. The Ordinary of this State shall have jurisdiction to hear and determine all questions in relation to any tax levied under the provisions of this act.

21. If it shall appear to the State Tax Commissioner that any tax which has accrued under this act has not been paid according to law said Commissioner shall report such fact, in writing, to the register of the Prerogative Court, and said register shall issue a citation citing the persons or corporations interested in the property liable to said tax to appear before the Ordinary on a certain day, not more than three months from the date of such citation, and show cause why such tax should not be paid; the service of such citation and the subsequent proceedings had thereon shall conform to the practice prevailing in the Prerogative Court. Upon the making of any decree the register of the Prerogative Court shall, upon the request of the State Tax Commissioner, furnish one or more copies of said decree, and the same shall be docketed and filed by the clerk of the Supreme Court, or by the county clerk of any county in this State, upon the request of the State Tax Commissioner, and the same shall have the same effect as a lien by judgment, and execution shall issue thereon according to the rules and practice appertaining to other judgments docketed and filed with said respective clerks.

22. Whenever the State Tax Commissioner shall have reason to believe that any tax is due and unpaid under this act, after the neglect and refusal of the persons or corporations interested in the property and liable to said tax to pay the same, he shall notify the Attorney-General of this State, in writing, of such failure to pay such tax, and the said Attorney-General, when so notified, if he have probable cause to believe that a tax is due and unpaid, shall prosecute the proceeding before the Ordinary of this State, as provided for in section twenty-one of this act, and the State Treasurer shall, on the warrant of the Comptroller, and the certification of the State Tax Commissioner, pay all the expenses of said proceeding.

23. The State Tax Commissioner shall keep a record in his department of all returns made by appraisers, cash value of annuities, life estates and term of years, and the amount of all taxes assessed by him; in addition to the foregoing the said Commissioner may enter in said books all other information and data which he may deem desirable or proper. All returns made by appraisers and all data otherwise gathered by the State Tax Commissioner, shall be considered as privileged communications and the same shall not be exhibited for inspection to any person or persons other than the executor or the administrator or a beneficiary entitled under the terms of the last will and testament or the intestate laws to share in the estate, or the duly authorized attorney of said executor, administrator or beneficiary. Nothing in this section shall be construed as prohibiting the use of such returns made by appraisers and all data otherwise gathered by the Commissioner in legal proceedings, involving the assessment, collection or abatement of taxes provided for by the various inheritance tax statutes prevailing in this State.

(Section 24 provides for rewards to informants as to tax improperly withheld by persons liable for it.

Section 25 imposes a penalty for false statements.)

26. The words "estate" and "property," wherever used in this act, except where the subject or context is repugnant to such construction, shall be construed to mean the interest of the testator, intestate, grantor, bargainor or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee or vendee, not exempt under the provisions of this act, whether such property be situated within or without this State. The word "transfer," as used in this act, shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future, by distribution by statute, descent, devise, bequest, grant, deed, bargain, sale or gift.

(Section 27 is a severability clause.

Section 28 is a repealer.).

II. ACT OF JULY 11, 1934.

Chapter 250, Laws of 1934.

AN ACT appropriating ten million dollars ($10,000,000.00) for emergency relief purposes from moneys derived from transfer inheritance taxes on estates now in litigation, where the question of the domicile of the decedent is involved.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The sum of ten million dollars ($10,000,000.00) is hereby appropriated for emergency relief purposes from

moneys derived from transfer inheritance taxes on estates now in litigation, where the question of the domicile of the decedent is involved; said sum to be paid out of the treasury as other emergency relief moneys are by statute directed to be paid; any law heretofore passed to the contrary notwithstanding.

2. This act shall take effect immediately.

III. SECTION 11 OF THE NEW JERSEY CERTIORARI ACT OF 1903, AS AMENDED BY THE ACT OF APRIL 12, 1907, P. L. 95.

In all cases of writs of certiorari now pending or hereafter brought to remove any tax or assessment, or other order or proceeding touching any local or public improvement, or to review the proceedings of any special statutory tribunal, or to review the suspension, dismissal, retirement or reduction in rank of any person holding an office or position, state, county or municipal, from which he is removable only for cause and after trial, the courts shall determine disputed questions of fact, as well as of law, and inquire into the facts by depositions taken on notice, or in such other manner as is according to the practice of the court; provided, either party may use the testimony taken before the tribunal, board or officer whose action is being reviewed which testimony shall be considered by the court the same as if it had been taken by deposition on notice and either party may take additional testimony. The court may reverse or affirm, in whole or in part, such tax or assessment or other order or proceeding, finding or determination, suspension, dismissal, retirement or reduction in rank reviewed.

APPENDIX B.

EXCERPT FROM PAGE 24 OF BRIEF OF ATTORNEY GENERAL WILENTZ OF NEW JERSEY, IN EDWIN C. NEVIN, ET AL. v. J. H. THAYER MARTIN, ET AL., DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY, EQUITY NO. 4805 (NOW PENDING).

"Process is not immediately available to any of the defendants for the forcible collection of the tax against the plaintiffs or any of their property. Such collection may be enforced only by a suit at law in the name of the State of New Jersey under Section 1, subsection fifth of the tax statute. (Chapter 228, Laws of 1909, as amended), or by a statutory proceeding in the Prerogative Court on an order to show cause why the tax should not be paid under Section 21 of the aforementioned act. In either event, of course, the taxpayer may interpose any defense which he might think fit, including his non-liability to the tax in question.

"*In re Vineland Historical, etc., Society*, 66 N. J. Eq. 291, 56 Atl. 1039; aff'd, 67 N. J. Eq. 730, 63 Atl. 119."